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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-357

VINCENT ALOI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Vincent Aloi, through his attorney, hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinions Below

The opinion of the Court of Appeals (App. B, *infra* pp. 3a-34a) is reported at 511 F.2d 585 (2d Cir., 1975). The opinion of the Court denying Aloi's Petition for Rehearing and Rehearing *En Banc* (App. A, *infra* at pp. 1a-2a) is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered on January 31, 1975. On July 7, 1975 the Court of Appeals denied a Petition for Rehearing and Rehearing *En Banc*. Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including September 5, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Can Petitioner's conviction for the substantive crime of "wilful use of a false and misleading offering circular" be sustained where

a) Petitioner's guilt was premised entirely upon the derivative liability theory of *Pinkerton* v. *U.S.*, 328 U.S. 640 (1946); and

b) an essential statutory element of the substantive offense was that it be committed "wilfully"; and

c) the jury was never instructed, nor did it find, that some member of the conspiracy must have "wilfully" committed the substantive offense before derivative liability could be imposed?

2. Can Petitioner's conviction of "wilful use of a false and misleading offering circular" based entirely on *Pinkerton* liability be sustained either

a) where the trial judge charged "use" as "issuance" and Petitioner was not a member of the conspiracy when the offering circular was "issued," or

b) where the Court of Appeals *sua sponte* substituted the entirely novel and statutorily unauthorized definition of "filing" and "existence," creating a fatal variance both from the crime charged in the indictment and the bases upon which it was submitted to the jury?

3. Does Rule 30 of the Federal Rules of Criminal Procedure bar review of these errors of constitutional magnitude where

a) a request for an appropriate charge was made by the government and relied upon by the defendants and,

b) the trial judge, in violation of Rule 30, did not instruct the parties that he would not give such a charge, but the defendants thereafter failed to object; or

c) does the "plain error" standard of Rule 52 permit review where an essential element of the crime is not charged?

4. As a matter of constitutional law, must the criminal sentencing procedure include "minimal requirements of due process" so that

a) the sentencing court may not consider totally unsupported allegations of other "criminal activity" in imposing a greater sentence, and/or

b) the procedural safeguards of confrontation and cross examination are available to a defendant who attempts to contest that misinformation?

Statutes Involved

The statutes involved are 15 U.S.C. 77(s)(a) and 77(x) and Rule 256(e), 17 CFR 230.256(e) printed as Appendix C, pp. 35-39a hereto.

Statement

1. Procedural History

Petitioner was convicted of one count of conspiracy, one count of wire fraud, and one count of "wilful use of a false offering circular" [1] ("Count 18") after a three month trial on a multi-count, multi-defendant securities fraud indictment in the United States District Court for the Southern District of New York (Knapp, *D.J.* and a jury).

On appeal Petitioner and three co-defendants separately raised extensive points which they argued required reversal; in a lengthy, and rather rambling opinion containing virtually no citations [2] the Court of Appeals affirmed the convictions of three appellants, including Petitioner, and reversed the conviction of the fourth.[3]

Aloi then petitioned for rehearing and rehearing *en banc* and the court called for a response from the govern-

[1] He was sentenced to five years on the conspiracy count and four years on the false offering circular count, those sentences run consecutively to each other, and consecutively to a seven year state sentence for one count of perjury. A five year sentence on the wire fraud count was suspended. Petitioner was also fined $16,000, the maximum amount permissible under the three federal counts.

[2] The opinion is reprinted here at pp3a-34a. In thirty pages, apparently addressing over twenty claims of reversible error, the court cites but six cases, none of these on the points to which it devotes the majority of its discussion.

[3] The conviction of Appellant John Savino was reversed for insufficiency of the evidence. A similar argument was made by Petitioner but was rejected.

ment on whether the trial court's failure to charge "wilfulness," an essential element of the crime charged on Count 18, required reversal. Subsequent to both this response and an additional "answer" which it permitted Aloi to file, the court denied the petition with an opinion which, while brief, served to substantially clarify the basis of its previous decision.[4]

The second opinion, when read with the first, suggests strongly that

> a) under *Pinkerton* v. *U.S., supra,* the government need not prove, nor the court charge, that some member of the conspiracy "wilfully" committed the substantive crime of use of a false offering circular before finding a co-conspirator like Aloi guilty on a derivative liability theory so long as Aloi "wilfully" entered the conspiracy, or
>
> b) failure to charge an essential element of a crime, notwithstanding previous settled law in the Circuit [5] was not "plain error" because of the "Pinkerton" charge and/or because of the "broad" (and, we argue, unjustified) definition of the term "use" employed for the first time by the Circuit in its first opinion.

Facts

The basic facts of the case, most favorable to the government, are set forth in the court's opinion at pp. 5a-9a. To avoid unnecessary repetition we would simply summarize the alleged conspiracy and add some additional

[4] As to the issues of wilfulness and "use". With the addition of the due process sentencing issue, which the Court of Appeals simply did not address, these are the only issues raised here.

[5] See p. 18, fn. 56 *infra*.

material relevant to Count 18 which is directly at issue here.

In late 1969 several co-conspirators[6] decided on a public offering of stock in At Your Service Leasing Co. (AYSL) a company in serious financial difficulty. Two defendants, Nelson and Miller,[7] who ran a financial consulting business, undertook to actually arrange the offering, including (with Graifer) the preparation of an offering circular, dated April 8, 1970 which was filed with the SEC.

The offering circular clearly warned potential buyers that the stock was essentially worthless,[8] and in fact, no legitimate purchasers ever appeared.

The owners and Graifer then enlisted Ralph Lombardo and Sebastian "Buster" Aloi[9] (*not* the petitioner *Vincent Aloi*) who referred them to a well known stock manipulator, Michael Hellerman, allegedly controlled by the defendant Dioguardi[10].

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[6] Including the owners, Price, Fredinand, Handler and Garek, all of whom were severed and never tried, and the manager Ed Graifer, who turned government witness.

[7] Each of whom pleaded and testified.

[8] As the Court of Appeals itself recognized. It wrote:

> "The offering circular was most explicit. In bold type on the first page it stated: 'THESE SHARES INVOLVE A HIGH DEGREE OF RISK'. Under 'Risk Factors to be Considered', were listed seventeen factors, any one of which should have deterred a prospective purchaser from buying the stock. And until the conspiracy began, no one did". Op. at p. 6a.

Once the conspiracy began, however, the circulars were never again "used". See p. 7 *infra*.

[9] Lombardo was tried, convicted and has not petitioned for certiorari. Sebastian "Buster" Aloi is the father of Petitioner whose acts both the trial court and the Court of Appeals often mistakenly ascribe to Petitioner.

[10] Hellerman also pleaded, served a very short sentence and testified for the government. Dioguardi was tried, convicted and has not petitioned for certiorari.

Hellerman took a look at the offering circular (T 906)[11] copies of which were, in turn,[12] delivered to his office (T 2780). There they sat on his couch (T 2782) until the stock was long since illegally sold and the SEC moved in. These offering circulars were never seen or mentioned again and it is conceded that Petitioner[13] never saw them or even knew of their existence.

No stock was actually sold prior to the expiration of the SEC-proscribed offering period on July 9, and the by-then unregistered stock which was ultimately unloaded was done so by a sophisticated rigging of buy-sell confirmations and after market "ring-around-the rosy" mainpulation[14] conducted by Hellerman and other associates.

The stock was in no way sold through the "use" of the offering circulars which were never seen by prospective purchasers and which never moved from Hellerman's office.

Petitioner's "role" in the conspiracy was, as the Court of Appeals put it, "collateral" (7a). In attempting to recover a legitimate debt owed by Hellerman to two of his friends[15] he was told of the swindle Hellerman was under-

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[11] References to the trial transcript are designated by the letter "T" followed by the appropriate page.

[12] As the beginning of his illegal attempts to sell the stock, Hellerman gave Nelson a bogus list of purported "buyers". Nelson's company, Tech-Ec, then typed up confirmations which it placed with subscription forms and offering circulars (T 3189-90) and delivered at Hellerman's request to his office (T 2780). Because there were really no such purchasers the confirmations, forms and circulars were, of course, never mailed.

[13] Who had not yet, even under the government's theory, entered the picture.

[14] In which the price of the stock is artificially inflated by phony purchase orders and it is finally dumped in the lap of an unsuspecting, legitimate broker.

[15] One of whom was John Savino, whose conviction was reversed.

taking. He allegedly put a halt to it until, sometime in June, his father convinced him[16] to let the deal[17] go through on the condition that the prior debt would be repaid out of the proceeds.[18] Thereafter, his only role in the conspiracy was to collect part of Hellerman's alleged share and distribute the amount of the money debt to his friends.

As a result of this participation he was convicted not only of conspiracy to commit securities fraud, but of Count 18, the wilful use of a false and misleading offering circular, for which he received an additional four year sentence.

REASONS FOR GRANTING THE WRIT

POINT I

The Court below drastically extended the doctrine of *Pinkerton* v. *U.S.* to permit the imposition of derivative liability without first requiring the jury to determine that a substantive offense had been committed.

A. The substantive crime which formed the predicate for Petitioner's derivative liability had, as an essential element, that it be wilfully committed by someone, and the jury was never so charged.

Petitioner was convicted of Count 18 of the indictment which charged the

[16] This allegedly occurred in a telephone conversation in Italian, reported by Graifer who spoke no Italian. The entirely unproven conversation resulted in the wire fraud conviction.

[17] There was also no evidence that Petitioner, unlike his father, knew anything at all about the stock swindle except that it existed and was being run by Hellerman.

[18] It was this alleged "power to stop and start the deal" which both the government and the court found made Petitioner a member of the securities fraud conspiracy. It is also conceded that he obtained no financial or other gain from the "deal".

"wilful use of a false and misleading offering circular"[19]

and sentenced to four years therefor.

As discussed in the statement of facts, *supra,* and in the Circuit Court opinion, Petitioner not only never "used"[20] the offering circular, he did not know of its existence. His only guilt of this offense, as the court charged, was predicated on the derivative liability theory of *Pinkerton* v. *U.S., supra.*

Pinkerton, of course, holds that a conspirator may be convicted of a substantive crime actually committed by another, providing that the latter is a member of the conspiracy, and the crime is committed in furtherance thereof. *Pinkerton, supra* at p. 647.

In this instance the crime allegedly committed by a member of the conspiracy was the wilful use of a misleading offering circular.[21] Under settled case law, e.g. *United States* v. *Robertson,* 298 F.2d 739 (2d. Cir., 1962),[22] wilfullness is an essential element of the offense which the government must prove beyond a reasonable doubt.[23]

[19] In violation of 15 USC section 77(x), 77(S)(a), Rule 256(e) (17 CFR section 230, 256[e]) and Form 1A, Schedule I as promulgated thereof. The statutory sections and Rules are reprinted in the Appendix hereto at pp. 35a-38a. The "unlawful use" was also charged as an object of the conspiracy under Count 1 of the indictment.

[20] Regardless of what definition is finally assigned to that term, see Point II *infra.*

[21] The indictment correctly charged the crime, as did the Government's request to charge, see *infra* at p. 19, fn. 58.

[22] In *Robertson* the Second Circuit reversed convictions on two securities fraud counts where wilfullness was not charged, notwithstanding affirmance on other counts where the sentences ran concurrently so as not to approve, "even by indirection" so insufficient a charge. *Id* at p.740.

[23] It is well settled that in imposing criminal liability where the act in question is not a *malum in se,* but requires a particular state of mind, the failure to instruct the jury as to the requisite wilfullness, knowledge or intent of the actor requires reversal, e.g. *U.S.* v. *Kronsby,* 418 F.2d 65 (6th Cir., 1969); *U.S.* v. *Byrd,* 352 F.2d 570, 572-74 (2d Cir., 1965); *U.S.* v. *Gillian,* 288 F.2d 796 (1961); *U.S.* v. *Ausmeier,* 152 F.2d 349, 356-57 (2d Cir., 1945).

The absolute necessity of proving wilfullness is apparent not only from the case law, but from the statutory scheme itself. The Securities Exchange Act of 1933, 15 U.S.C., sections 77(a) *et seq.*, is legislation aimed at informing the public; in pursuit of this goal, the Act permits various civil remedies, including injunctions and damages. See generally Loss, 1 *Securities Regulations* (1961). It is only Section 77(x) which makes violation of the Act a criminal offense,[24] and that section specifically requires wilfulness as opposed to carelessness, mistake or the like.[25]

For the jury to find that the crime charged in Count 18 of the indictment was committed, it thus had to find that it was committed wilfully,[26] yet the court never once mentioned this in its charge.

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[24] For a general discussion of the wilfullness requirement in 77(x) cases see Mathews, *Criminal Prosecutions Under the Federal Securities Law*, 39 Geo. Wash. L. Rev. 901, 950 (1971) and Loss, *supra* p.1309.

[25] In this respect, the Securities Act is remarkably similar to the civil/criminal distinctions under the Internal Revenue Code (which provides for criminal penalties beginning at section 7201 *et seq*). There too, what might otherwise be mistaken or negligent by the taxpayer becomes criminal only when it is *wilfully* done. In that context, this Court has recognized that wilfulness involves "bad faith or evil intent," *United States* v. *Murdoch*, 290 U.S. 389, 398 (1933), or "evil motive and want of justification in view of all of the financial circumstances of the taxpayer." *Spies* v. *United States*, 317 U.S. 492, 298 (1943).

As this Court has recently reiterated, this is so because: "The Court's consistent interpretation of the word 'wilfully' to require an element of mens rea implements the pervasive intent of Congress to construct penalties that separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers." *United States* v. *Bishop*, 412 U.S. 346, 361 (1973). This same rationale applies to the Securities Act.

[26] There was substantial evidence in the record from which the jury could have found that the misrepresentations or omissions in the offering circular constituting the "falseness" charged in the indictment were not *wilfull*, but were rather the result of negligence or mistake. The co-conspirator most intimately connected with the issuance of the prospectus, Ed Graifer, testified that he was not even aware it was false or fraudulent until he was indicted! (T 880).

Instead, it charged:

> I advise you as a matter of law, if you find that this circular did fail to make the disclosures mentioned in the indictment and that if such disclosures would in your judgment have been of material interest to a purchaser of the securities, the issuance of that prospectus would have violated the securities laws of the United States.[27] (TR. 5495)[28]

The jury was thus able to find Petitioner guilty of the "wilful use of a false and misleading offering circular" which he never saw, and of whose existence he did not know, *solely* by finding that some co-conspirator[29] "issued"[30] an offering circular with material non-disclosures[31] whether

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[27] This, of course, is true. It simply would not have violated the *criminal* laws.

[28] The Court went on to charge derivative *Pinkerton* liability as follows:

> I further advise you, if you find the issuance of the circular was in furtherance of the conspiracy and in the reasonable contemplation of the contemplation (sic) of the conspirators, you may find any defendant whom you may have found guilty of conspiracy, to be also guilty of the crime of issuing the false financial statement alleged in count 18 of the indictment. (T5495)

[29] The Court of Appeals opinion suggests this may have been Graifer, Norman, Miller or Hellerman, depending on one's view of "issue".

[30] Petitioner argued extensively below that the non-disclosures alleged were not "material" in that they involved no additional dilution of the proceeds of the offering which would be of concern to a prospective purchaser, nor would the existence of any undisclosed underwriter be of material interest to any of those who ultimately purchased the stock—only because they did so believing in a guaranteed "spread".

[31] The evidence was at best conflicting as to whether the alleged non-disclosures were "material" since no purchasers or prospective purchasers were ever shown the offering circular. See pp. 16-17, *infra*.

that "issuance" was mistaken, negligent *or*, conversely, wilful.

The charge was thus constitutionally defective in that it permitted a finding of guilt *without* a finding as to an essential element of the crime, and in fatal variance with the indictment, *Stirone* v. *U.S.*, 361 U.S. 212 (1960).

B. The Court below incorrectly and unconstitutionally extended *Pinkerton* to fill this fatal variance.

In the court below, Petitioner and his co-defendants repeatedly [32] argued that the clear failure to charge wilfulness required reversal on Count 18. The Government, with equal perserverance, argued that the absence of a finding of wilfulness as to the particular crime charged, no matter by whom committed, was irrelevant so long as it was shown that Petitioner or his co-defendants had wilfully joined the conspiracy. In its main opinion the court below never dealt with either of these arguments,[33] but its second opinion, denying rehearing, appears to adopt the government's theory.[34] Indeed this is the only theory, if accepted, upon which the conviction may be sustained.

This "theory," however, not only violates the rationale of *Pinkerton* itself, it extends that case far beyond the nar-

[32] In their briefs, reply briefs and in Petitioner's Petition for Rehearing.

[33] It apparently disposed of the whole wilfulness question on some theory of waiver, although the failure to charge wilfulness is mentioned only once, in conjunction with other, definitional, omissions in the charge which were *not* essential elements of the crime, and which the Appellants did not claim rose to the dimensions of constitutional error.

[34] As stated previously, after the Petition for Rehearing was filed, the Court called for a response by the government on the issue of wilfulness alone. The subsequent opinion, upholding the failure to charge wilfulness, states that it was not error, "in light of the trial court's charge on Pinkerton v. U.S." a2, *infra*.

row construction placed on it by this Court, *Nye & Nissen* v. *U.S.*, 336 U.S. 613, 620 (1949) to permit separate, additional criminal punishment for any overt act, not necessarily itself criminal, committed in furtherance of a conspiracy.[35]

Pinkerton and all of its progeny[36] clearly hold that before derivative criminal liability can be imposed, a "crime" or "substantive offense" must first have been committed, e.g. *Pinkerton, supra* at pp. 647-48, *Nye & Nissen, supra*.[37]

The Court's decision below would turn this holding on its head and allow, in true Alice-in-Wonderland fashion, the determination of one aspect of derivative liability[38] to itself

[35] The fear of additional punishment even for *criminal* acts which are also charged as overt acts of the conspiracy is reflected in Congress's decision in the proposed Federal Criminal Code to reverse "a judicially developed doctrine which imposes complicity liability based solely upon membership in the conspiracy." *Hearings on Reform of Federal Criminal Law Before the Subcommittee on Criminal Law and Procedures of the Senate Committee on the Judiciary*, 92nd Cong., 1st Sess., pt. 1 at p. 225 (1974). This aspect of *Pinkerton* has also been criticized in, *inter alia, Developments in the Law: Criminal Conspiracy* 72 Harv. L. Rev. 920, 998-1000 (1959).

[36] In shepardizing all citations of *Pinkerton*, counsel has not found a single case where this fundamental proposition was not understood and honored. As one recent but typical exegisis of *Pinkerton* states:

> In the Pinkerton case there was so evidence that Daniel Pinkerton had committed the *substantive offense* for which he had been convicted, but *it was clear that the offense had been committed* and that it had been committed in furtherance of an unlawful conspiracy of which he was a member. *U.S.* v. *Sperling*, 506 F.2d 1323, 1342 (2d. Cir., 1974) *cert. den.* 420 U.S. 962 (1975).

[37] Interestingly, in *Nye & Nissen*, as in *Pinkerton*, derivative liability was sought to be imposed where the co-conspirators who committed the substantive crimes were actually convicted of them, see *Nye & Nissen* at p. 628 (dissenting op. of Justice Murphy). Here, of course, none of those co-conspirators who might have been directly guilty of Count 18 were ever tried or convicted of it.

[38] i.e. participation in a conspiracy.

independently establish an essential element of the crime for which another member of the conspiracy is held derivatively liable.

There are dangers enough in strict application of *Pinkerton*[39] and in conspiracy in general[40] that this new, unprecedented approach should be immediately disavowed. This Court should grant certiorari to do so unqualifiedly.

POINT II

The "use" of a false offering circular in Count 18 was not charged by the Trial Court and was statutorily and constitutionally misconstrued by the Court of Appeals.

A. The Trial Court.

Although the indictment charged that the defendants "wilfully used and caused to be used"[41] a false offering circular, the trial judge never instructed the jury as to "use"

[39] Commentators have suggested that the propriety of *Pinkerton* is itself in question, see Perkins, *The Act of One Conspirator* 26 Hastings L.J. 337 (1974) and this Court's long silence on the issue similarly suggests a possible lack of present viability.

[40] As Justice Douglas, dissenting in another case, and on other grounds prophetically stated:

> Conspiracy presents perplexing problems that have long concerned courts. See *Krulewitch* v. *U.S.* 336 U.S. 440, *Delli Paoli* v. *U.S.*, 352 U.S. 232. While it is proper at times to join a conspiracy count with substantive counts even where the latter are the same as the overt acts charged in the conspiracy counts, *Pinkerton* v. *U.S.*, there is danger of multiplication. The loose practice of trying to bring together into one conspiracy those whose ties are at best extremely tenuous has often been criticized. We allow conspiracy to be put to new dangerous uses when we sanction the practice approved here. *Schaeffer* v. *United States*, 362 U.S. 511, 524 (1960) (dissenting opinion of Justice Douglas) (footnotes omitted).

[41] Tracking the language of the SEC Rule, pp. 36a-38a *infra* whose violation was made criminal under 15 U.S.C. 77(x).

at all. Instead, he charged only that if the jury found that the circular had been "issued"[42] it could find the defendants, including petitioner, guilty under *Pinkerton*.

This rather peculiar substitution[43] requires reversal either because it constitutes a fatal variance from the indictment, *Stirone* v. *U.S. supra*,[44] or, if "use" properly includes "issuance", because Petitioner was not a member of the conspiracy at the time the circulars were issued,[45] and accordingly could not be convicted under the derivative liability of *Pinkerton*. *U.S.* v. *Cantone*, 426 F.2d 902, 904 (2d Cir., 1970).[46] See *Levine* v. *U.S.* 383 U.S. 265, 266-67 (1966) (*per curiam*).[47]

B. The Court of Appeals.

In an apparent attempt to avoid both the argument above and Aloi's argument that the offering circulars were

[42] The entire charge, at p. 11, fn. 28, *supra*, employs the term "issued" or issuance four times; "use" or "using" never appear.

[43] Petitioner believes that the trial judge charged the narrower "issauance" rather than "use" because the record could support no more. For the record is clear that once the offering circulars were printed and filed, the boxes containing them sat, apparently forever, on the couch in Hellerman's office, never to be seen again (T 2780, 2782) and see *infra*.

[44] *Stirone*, of course, holds that a jury may not constitutionally find guilt on a theory which the grand jury did not charge.

[45] The offering circular was filed on April 8, 1970. By the government's own theory, Petitioner did not enter the conspiracy until some time in June of 1970.

[46] *Accord: U.S.* v. *Knipperbeng*, 502 F.2d 1056, 1059-60 (7th Cir., 1974); *U.S.* v. *Roberts*, 416 F.2d 1215 (5th Cir., 1965). See *Developments in the Law: Criminal Conspiracy*, *supra* at p. 924.

[47] In *Levine* this Court reversed *Pinkerton* convictions based upon the concession of the Solicitor General that "an individual cannot be held criminally liable for substantive offenses committed by members of the conspiracy before that individual had joined or after he had withdrawn from the conspiracy." To the extent that this reversal based on concession falls short of a clear holding, this Court should take this opportunity to unequivocably so hold.

in fact never "used."[48] the Court of Appeals was forced to stretch for an entirely novel [49] and unjustified construction of the term "use".

The Court wrote:

> To be sure, the offering circular was not used in the manner normally to be expected, namely, mailed to the prospective purchasers before sale (sic) were consummated. But having been *filed* with the SEC, it was the genesis of the subsequent plan to defraud, and facially at least, the *existence* of the filed circular lent an aura of legitimacy to the scheme.[50] Op. at p. 28a (emphasis added).

Use is thus defined for the first time as either "filed" or "existing." The former construction is completely erroneous under the very regulation sought to be construed [51]

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[48] The purpose of an offering circular is, of course, to fully inform prospective purchasers of all relevant facts concerning the company whose stock they may buy. Accordingly, an offering circular must be filed with the SEC as a condition precedent to the granting of a "Reg. A exemption" and must be delivered prior to or at the time of sale of all exempt stock to which it pertains. 15 U.S.C. section 77(s) [17 C.F.R. section 230.256]. Petitioner argued that the offering circulars were never "used" because they were never shown or sent to prospective customers or buyers. See fn. 43 *supra*. The government based its argument solely on supposed inferences that the circulars were in fact mailed, but the Court of Appeals forcefully agreed with Petitioner that no such inferences could be drawn from the record. Op. p. 28a fn. 9.

[49] The Court's opinion in the Petition for Rehearing tacitly recognizes this, referring to "the broad definition of 'use' we have previously approved" p. 2a.

[50] This statement represents a rather fanciful leap. To whom was the "aura of legitimacy" lent by the offering circulars? Since no one but a few of the conspirators ever saw them, it is hard to imagine who the Court of Appeals had in mind.

[51] The regulation whose violation is charged specifically employs the terms "prepared," "filed" and "used" separately; clearly the latter may not, in an immediately succeeding sentence, subsume

and the latter definition not only offends all notions of common sense and usage, but, if seriously adopted, would cause the crime to be invalidated either as unconstitutionally vague or as a prohibited *ex post facto* offense.

Finally, the conviction for "use" so construed is invalid under the well settled principle that a jury may only constitutionally find "guilt where the proof adduced *and* the basis on which it was submitted were sufficient to support the verdict" *Nye & Nissen, supra.*[52]

This Court should grant certiori to clearly disavow [53] a statutory construction so dangerous and unprecedented.

POINT III

Rule 30 does not bar review.

The Court of Appeals attempted to sidestep reversal on the issue of failure to charge an essential element of the

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all the former. The regulation reads as follows: "(e) If the offering is not completed within nine months from the date of the offering circular, a revised offering circular shall be *prepared, filed* and *used* in accordance with these rules as for an original offering circular, except that in the case of offering under stock purchase, savings, stock option or other similar plans for the benefit of employees, if the offering is not completed within 12 months from the date of the offering circular, a revised offering circular shall be *prepared, filed* and *used* in accordance with these rules as for an original circular. In no event shall an offering circular be *used*, which is false or misleading in light of the circumstances then existing" (emphasis added).

[52] See also *U.S.* v. *Bollenbach*, 326 U.S. 607, 613-615 (1946) where this Court chastised the Court of Appeals because it ". . . evidently felt free to disregard the 'mistake in charge' only on its assumption [that the defendant could be convicted on another theory]. Id. p. 610

[53] Obviously this is required to give guidance not only to the lower courts, but to law enforcement and prosecution officials who may otherwise act on the supposition that a new crime has non-legislatively come into existence.

crime and, to some extent the "use" issue by apparent[54] reliance on Rule 30 of the Federal Rules of Criminal Procedure.[55]

There are at least two reasons why this is not the case; a decision by this Court on either would constitute an extremely important and useful exegesis of the otherwise generally ignored provisions of Rule 30.

A. Plain error.

Rule 52 requires reversal of a conviction based on "plain error" even in the absence of objection.

At least two Circuits[56] have held that the failure to charge an essential element of the crime constitutes such

[54] The Court's discussion and disposition of all issues raised as to the charge is rather confused, see op. at p. 18a, but the reference to plain error in the opinion on petition for rehearing supports this understanding.

[55] Rule 30, in its entirety, reads as follows:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

[56] With the rather aberrant exception of the instant case, this is clearly the rule in the Second Circuit, e.g. *U.S.* v. *Howard*, 506 F.2d 1131 (2d Cir., 1974). *Accord Findley* v. *United States*, 362 F.2d 92 (10th Cir., 1966). In the Second Circuit, in fact, the failure to charge an essential element is deemed so serious that it requires reversal even where the parties have not raised the issue on appeal. *U.S.* v. *Houle*, 490 F.2d 167, 171-72 fn. 10 (2d Cir., 1973).

"plain error". As wilfulness was such an essential element, see I, *supra*, this Court should grant certiorari and so hold.

B. Under Rule 30, waiver cannot be found where an appropriate request to charge was made.

Eleven days prior to conclusion of the trial, the judge passed around a charge in another securities case to give counsel "the gist of how [he] handled it."[57]

Subsequent to this, both sides submitted requests to charge on various issues. The government, tracking the statutory language, specifically requested a charge on wilfulness for Count 18,[58] and the defendants, who opposed a number of the government's requests, did not object.

After these requests were made, in fact, the judge indicated that he basically agreed with the government on the law, but when the charge was finally given, no mention of wilfulness was made.

[57] This occurred rather casually at a morning conference in chambers at which a number of other matters were being discussed. Counsel were not given copies to take and read at leisure, nor as the judge stated, was the same charge to be given—. "It is just my approach I am showing you." T3657

[58] The government's request was as follows:

REQUEST NO. 24

Elements of Count 18

Count 18 charges as follows:

Please read Count 18

The relevant statute is violated if the government has proven the following elements beyond a reasonable doubt.

First: That a defendant, co-conspirator or other person, in connection with the offer or sale of a security, used an offering circular which was false and misleading in light of the circumstances then existing.

Second: That the defendant under consideration by the jury, did so wilfully and knowingly or caused others to do so wilfully and knowingly.

Petitioner has argued that once an appropriate request to charge is made, a defendant may rely on that request regardless of who submitted it[59] and that subsequent failure to object should not constitute a waiver.[60]

This is particularly true where, as here, the judge did not inform counsel, as required by Rule 30, that the request on Count 18 would *not* be honored.[61]

In our reading of Rule 30, this fact is most significant. The purpose of the rule is to give counsel an opportunity to tell a trial judge what they want, and for him to inform them, *prior* to giving his charge, what they will get. At the completion of the charge, having been alerted to what has been omitted,[62] counsel must determine whether to object. Where the judge does *not* inform the parties that he refuses to charge as they have requested, they should not, pursuant to the statutory scheme, be deemed to have waived the "objection" presented in their proposed charges.

This Court should grant certiorari to decide this previously undetermined issue.

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[59] The obvious purpose of the Rule, see fn. 62 *infra*, would seem to make any such distinction irrelevant.

[60] While this is apparently an issue of first impression, a number of such cases suggest this position since, in referring to preservation of the objection they speak in the disjunctive—i.e. the defendant waived because he *neither* requested *nor* objected. See e.g. *U.S.* v. *Knippenberg*, 502 F.2d 1056, 1061 (7th Cir., 1974). *U.S.* v. *Bynum*, 485 F.2d 490, 503 (2d Cir., 1973); *Chatman* v. *U.S.*, 411 F.2d 1139 (9th Cir., 1969).

[61] The rule specifically provides that after requests have been filed:

> "The Court shall inform counsel of its proposed action upon their requests prior to their arguments to the jury."

[62] The clear intent of the Rule's requirement of prior judicial notification is precisely to avoid what happened here—i.e. counsel not previously alerted to omissions from the request to charge missing those omissions in the heat of trial.

POINT IV

Petitioner was deprived of minimum requirements of due process when he was sentenced for "other crimes" unsupported by reliable evidence, and when the Trial Court refused his request for confrontation and cross-examination.

In recent years judges,[63] academics[64] and practicing lawyers[65] have increasingly pointed out that

> Nowhere is the incomprehensibility and inconsistency of our system of criminal justice more clearly revealed than in the sentencing process.
>
> Berkowitz, *The Constitutional Requirements for a Written Statement of Reasons and Facts in Support of the Sentencing Decision: A Due Process Proposal*, 60 Iowa L. Rev. 205 (1974).

While this Court has expanded the concept of the availability of "minimum requirements of due process," including confrontation and cross-examination to, *inter alia*, welfare recipients, *Goldberg* v. *Kelly*, 397 U.S. 254, 269 (1970), holders of government connected jobs, *Greene* v. *McElroy*, 360 U. S. 474, 496 (1959), juveniles, *In re Gault*, 387 U.S. 1 (1967), and, most recently, to parolees, *Morrissey* v. *Brewer*,

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[63] See e.g., Frankel, *Criminal Sentences: Law Without Order*, (1973).

[64] See, e.g., Packer, *The Limits of the Criminal Sanction*, (1970).

[65] See, e.g., Berkowitz, *infra;* A.B.A. Project on Minimum Standards of Criminal Justice, *Sentencing* (Approval Draft 1968).

As another ABA report began,

> "Among the ironics of the law—[are] of the most striking involves a comparison of the methods for determining guilt and the methods for determining sentence".

For, at sentence,

> ". . . the whole intricate network of protection which were [the defendant's] at the trial vanishes and gives way to the widest latitude of judicial discretion. ABA, Project on Minimum Standards of Criminal Justice, *Appellate Review of Sentences*, p. 1 (Text Draft 1967)."

408 U.S. 471 (1972), and probationers, *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973) in the critical[66] area of sentencing, this Court has not spoken since *Williams* v. *New York*, 337 U.S. 241 (1949). Its failure to do so has resulted in an anachronistic island of arbitrariness and lawlessness in the midst of a system otherwise controlled by the mandates of the constitution.

It is time for the Court to address the problem of minimal due process safeguards in sentencing, and this case provides the perfect opportunity.

A. The sentence imposed was arbitrary, capricious, and based on "misinformation of constitutional magnitude".

The necessity for the imposition of certain due process requirements is nowhere better displayed than in a situation where their absence is dispositive.

In this case the Petitioner was sentenced to the unusually[67] long term of nine years (five and four year sentences running *consecutively*) and, equally unusually[68], this sentence was to run consecutively to a state sentence of seven years.

In determining the sentence, the trial judge relied not only on the traditional presentence report, but also on a

[66] *Mempa* v. *Rhay*, 389 U.S. 128, 134 (1967).

[67] The likelihood of a prison sentence for securities fraud is only 21.5% in all federal courts; in the Southern District of New York when a prison sentence *is* imposed, its average duration is one year and seven months; Whitney North Seymour Jr., *1972 Sentencing Study for the Southern District of New York*, N.Y.S. Bar Journal, 163, 164-65 (April, 1973).

[68] Federal sentences, particularly for multiple counts based on a single criminal act or transaction, are almost invariably concurrent. See, *e.g.*, *Remarks of Professor Herbert Wechsler, Second Circuit Judicial Conference on Appellate Review of Sentence*, 32 F.R.D. 249, 289 (1962) 8a Moore, *Federal Practice* ¶ 32.04 (6) at pp. 32-71, 32-73 (Cipes. ed. 1973).

specially prepared report and set of recommendations submitted by the prosecutor at the judge's request.[69] Both reports, and the prosecutor's oral presentation, relied far less on the securities fraud of which Petitioner was convicted than on a *Godfather*-like scenario in which Petitioner was accused of being, *inter alia*, "The head of the organized crime family in New York," A 137, 138[70] and of having

> authorized an open contract to murder Joey Gallo [with] the murder actually carried out by his associates. A 139-140[71].

In surveying this mass of inflammatory and unsupported charges the trial judge himself stated

> This case in a sense poses a dilema. These are various facts about other things except what is involved in this case, the probation report and the sentence, in that the writer, *the probation officer said it was beyond his power to separate fact from fiction*

[69] The use of such a report itself is unusual and raises serious questions, see, *e.g.*, *U.S.* v. *Rosner*, 485 F.2d 1213 (2d Cir. 1973), *cert. den.* 417 U.S. 950 (1974), *U.S.* v. *Allsenberrie*, 424 F.2d 1209 (7th Cir. 1970). *Haller* v. *Robbins*, 409 F.2d 857 (1st Cir. 1969), Moore, *supra*, ¶ 32.04[3]. In any event, the submission of the prosecutor's recommendations—which were, not surprisingly, for maximum, consecutive terms—graphically underscores the adversary nature of the sentencing procedure and the concurrent necessity for protection which classically accompany such adversary proceedings.

[70] References are to the Appendix on Appeal to the Second Circuit, where the relevant sentencing minutes were reproduced.

[71] Joey Gallo, a notorious New York mobster, was murdered in 1972. No one has ever been charged with, or convicted of his death. Significantly, a recent and extensive New York Times feature article, purporting to be an inside, eyewitness account of the murder, entirely failed to mention Petitioner while naming many other gangland figures in connection with the murder. Gage, *Key Mafia Figure Tells of "Wars" and Gallo-Columbo Peace Talks*, N.Y. Times, July 7, 1975 p. 1, col. 1.

and I am afraid it is beyond my power, too. A 153-54 (emphasis added)

Petitioner's lawyer, confronted by all the admitted innuendos, character assasinations and unsupported charges specifically requested a right of confrontation[72] and cross-examination (A 147-148) to demonstrate the falsity of the information which was being considered against his client.

The trial judge denied these requests and, clearly relying in part on the F.B.I. and Prosecutor's untested and unsupported charges,[73] imposed the extraordinary sentence discussed above.

B. Due process was violated by the imposition of a sentence for crimes for which Petitioner was not tried, and by denial of the right to confrontation and cross-examination.

The outrageous miscarriage of justice and the misuse of the judicial process in this case could have been prevented in two ways, both of which, we believe, are constitutionally mandated.

First, as a matter of due process, the information considered by the trial judge could have been limited to actual crimes resulting in conviction, or, at the very least, in criminal charges, rather than unsupported allegations of generalized "criminal activity." The Circuits are clearly in conflict on this issue and certiorari should be granted to resolve it.

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[72] The material in the presentence report and the Prosecutor's recommendations was almost entirely double and triple hearsay passed through the F.B.I. by the usual "unidentified informants."

[73] The judge clearly believed that Aloi "knew something about the Gallo killing" and that he was "in some way involved in that killing." A 169, 170, 171. He also apparently believed Government accusations about alleged death threats to witnesses at the trial (A 142), although those witnesses had earlier testified and made no mention whatsoever of such "threats."

Second, a requirement of confrontation and cross-examination, when crucial and probably dispositive facts are clearly in issue, should clearly have been imposed in line with this Court's general exegesis of minimum requirements of due process.

Both of these imperative due process considerations require the granting of certiorari, and will be discussed briefly and *seriatim*.

(i) *Consideration of "Crimes" Without Convictions.*

There is no more deeply ingrained concept of due process than that a man should not be deprived of his liberty for crimes he has not committed, and for which he has not been tried or convicted. Nevertheless, the present entirely uncircumscribed area of sentencing "discretion" permits this precise unthinkable occurrence to happen, as here, again and again.

Relying on this Court's 1949 decision in *Williams* v. *New York, supra,* many lower courts have permitted trial judges unbridled discretion in considering any and all material, supported or unsupported, about a defendant's unrelated "criminal activity."

As general concepts of due process and fairness have subsequently been expanded by this and other courts, the *Williams* decision has come under frequent attack, and commentators[74] and judges[75] have suggested that it be limited strictly to its facts.

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[74] See, *e.g.,* Note: *Due Process of Felony Sentencing* 81 Harv. L. Rev. 821 (1968); Berkowitz, *supra.*

[75] As Judge Swygert of the Seventh Circuit recently wrote,

> I recognize that present authority may permit a sentencing judge to consider hearsay statements even when they relate to other criminal activity for which there has not been a conviction (citing *Williams* and other subsequent authorities). It should be noted, however, that in *Williams* the defendant did not challenge

In the absence of recent guidance from this Court, the lower courts have grappled with the question with widely differing results.

Some Circuits have refused to allow sentencing consideration of prior criminal acts unless there is proof of an actual, constitutionally valid conviction, *e.g., Baker* v. *United States,* 388 F. 2d. 931, 933-34 (4th Cir. 1965) (laying down minimal standards for presentence reports). See *U. S.* v. *Janiec,* 464 F. 2d. 126, 129 (3rd Cir. 1972).

Other Circuits, relying on *Williams,* clearly allow consideration of all criminal behavior, whether or not resulting in conviction, *e.g., U. S.* v. *Johnson, supra* (7th Cir.), *U. S.* v. *Doyle,* 348 F. 2d. 715, 721 (2d Cir. 1965).

Still another approach is taken by the Ninth Circuit, which has held that information about other criminal activity may not be considered unless it essentially meets a probable cause standard. *U. S.* v. *Weston,* 448 F. 2d. 626 (9th Cir. 1971), *cert. den.* 404, U.S. 1061 (1972).[76]

Even the American Bar Association has taken a position, specifically recommending that all arrests and other

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the contention that he had committed these other crimes. The specific question of use of prior arrests and pending charges was not addressed in *Williams* and I believe the case should be strictly limited to its facts. *U.S.* v. *Johnson,* 507 F. 2d 826 (7th Cir. 1974) *cert. den.* 95 S. Ct. 1682 (1975) (separate opinion, concurring in part, dissenting in part). Accord, *U.S.* v. *Weston,* 448 F. 2d 626, 631, 663 (9th Cir. 1971).

[76] The *Weston* rationale has been followed by other courts, *e.g., United States* v. *Williams,* 499 F. 2d 52, 55 (1st Cir. 1974), *Nickens* v. *State,* 34 Md. App. 284, 301 A. 2d 49 (1973) and discussed approvingly by commentators, *e.g.,* Note, *Criminal Procedure; Probable Cause and Due Process at Sentencing,* 50 N. Car. L. Rev. 925 (1972), Note: *Toward a Probable Cause Standard in Sentencing,* 34 Md. L. Rev. 133 (1974). A variation in this approach is that taken by the Fifth Circuit which requires vacation of sentence "based on assumptions not supported in the record." *U.S.* v. *Looney,* 501 F. 2d 1039, 1042 (5th Cir. 1974).

dispositions short of judgment should be excluded from presentence reports. A.B.A., Project on Minimum Standards for Criminal Justice, *Probation,* p. 37 (Approved Draft, 1970).

Whatever this Court may finally determine on this issue, it is clear that it is now overripe for decision, and that the uniform administration of criminal justice would best be served by granting certiorari and resolving the question once and for all.

(ii) *The Right to Cross Examination and Confrontation.*

Reading together this Court's due process prohibition on sentences based on misinformation, *Townsend* v. *Burke,* 334 U.S. 736 (1948), and its more recent determination that due process requires counsel at sentencing *Mempa* v. *Rhay,* 389 U.S. 128 (1967),[77] one is compelled to the conclusion that those safeguards deemed the "minimal requirements of due process" are also required at sentencing. Indeed, this Court's expansion of those requirements and the instances in which they are constitutionally mandated, see pp. 21-22, *supra,* requires such a conclusion and the accompanying disavowal of *dicta* in *Williams* v. *New York* to the contrary.[78]

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[77] There the Court reiterated the holding of *Gideon* v. *Wainwright,* 372 U.S. 335 (1963), as standing for the proposition that appointment of counsel is required "at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." *Mempa, supra,* at p. 134. It went on to hold, that "In particular, *"Townsend* v. *Burke, supra,* illustrates the critical nature of sentencing in a criminal case. . . ."*id.*

[78] In *Williams,* of course, the defendant never requested confrontation or cross examination; *Williams, supra,* at p. 244, and many courts and commentators have since pointed out that the restrictive principle for which it is generally cited goes far beyond what the facts support. See, *e.g., U. S.* v. *Picard,* 464 F.2d. 215, 219 (1st Cir. 1972), *U.S.* v. *Trigg,* 392 F.2d 860, 869 (7th Cir.), *cert. den.* 391 U.S. 961 (1968), Lehrich, *The Use and Disclosure of Presentence Reports in the United States,* 47 F.R.D. 225, 247 (1969). Further, since 1948 the "view of due process which underlies *Williams*" has changed dramatically. Note: *Due Process in Felony Sentencing, supra* at pp. 827-28.

This court's consistent 10 year line of procedural due process cases in the area of criminal prosecution is similarly compelling.

Since *Kent* v. *United States*, 383 U.S. 541 (1966) and *In re Gault, supra*, this Court has required minimum safeguards in quasi-criminal proceedings previously characterized as "discretionary."

Next, sentencing was expressly recognized as an integral part of the criminal process where counsel was required, *Mempa* v. *Rhay, supra*, and a due process hearing was required at a post sentencing procedure where the defendant was subject to additional punishment. *Specht* v. *Patterson*, 386 U.S. 605 (1967).

Subsequently, this Court held that sentences based upon consideration of a prior record including convictions obtained without a lawyer violated *Townsend* v. *Burke, supra*, and must be set aside. *U.S.* v. *Tucker*, 404 U.S. 443 (1972).[79]

Finally, in two post-conviction situations which were expressly recognized as "not a part of the criminal prosecution," this Court extended the "minimum requirements of due process" *including* the right to confrontation and cross examination to parole and probation revocation proceedings. *Morrissey* v. *Brewer*,[80] *supra*, at p. 489, *Gagnon* v. *Scarpelli, supra*, at p. 781.

[79] In holding that a sentence possibly based on convictions acknowledged by the defendant but obtained without a lawyer must constitutionally be set aside, the Court in *Tucker* returned to the underlying rationale of *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), the basic unreliability of convictions so obtained. The Court specifically found "quite beside the point" the question of whether the outcome of those prosecutions would have been different if the defendant had been aided by counsel, *id.* at p. 447-48. If consideration of a conviction for a crime obtained after trial but without counsel is "misinformation of constitutional magnitude," *id.*, p. 447, how much more unreliable is consideration of "convictions" with no trial at all.

There is no way to square this line of cases, particularly *Morrissey* v. *Gagnon*[81] with denial of the right, at sentencing, to rebut allegedly incorrect or inaccurate information[82] by confrontation and cross examination.[83]

This Court should grant certiorari to correct this glaring anamoly and to insure that due process safeguards are available wherever constitutionally mandated.

[80] In *Morrissey*, Justice Powell noted that revocation of either parole or probation is like a trial in that it has "two analytically distinct components." The first, like the criminal trial itself, is whether the parolee has, in fact, acted in violation of one or more of the conditions of his parole. The second, analagous to sentencing, is whether the parolee should be recommitted to prison, or whether other steps should be taken. *Morrissey, supra*, at pp. 479-80. Significantly, he found that in requiring two hearings to determine these two separate questions, the latter must be "less summary . . . because the decision under consideration is the ultimate [one]." *id.* It is the determination of this latter dispositional issue, i.e., the second "sentence," which requires confrontation and cross examination. *id.*, p. 489.

[81] This Court's recent decision in *Wolff* v. *McDonnell*, 418 U.S. 539 (1974) is in no sense to the contrary. Unlike sentencing, prison disciplinary proceedings are not "a part of the criminal prosecution," *id.*, p. 55. Even more significantly, Justice White distinguished *Morrissey* v. *Gagnon* stating

> . . . one cannot automatically apply procedural rules designed for free citizens in an open society, or for parolees or probationers under only limited restraints, to the very different situation presented by a disciplinary proceeding in a state prison. *id.*, at p. 560.

In the spectrum thus drawn by the Court, the still free citizen who awaits sentence must certainly be accorded the same, if not more, procedural protections than the parolee or probationer who has already been sentenced.

[82] It is precisely for this purpose that the rights of confrontation and cross examination have developed and been applied. *Greene* v. *McElroy, supra*, at pp. 496-97.

[83] This is the position taken by the A.B.A., *Standards Relating to Sentencing Alternatives and Procedures*, Section 5.4 (Approved Draft, 1968). See also Note, *Due Process in Felony Sentencing*, 81 Harv. L. Rev. 821, 824-25 (1968).

CONCLUSION

For all of the above reasons, this Court should grant a writ of certiorari to review the judgment below.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1144, 1150, 1159, 1171—September Term, 1973.

(Decided July 7, 1975.)

Docket Nos. 74-1220, 74-1278
74-1614, 74-1727

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

VINCENT ALOI, et al.,

Defendants-Appellants.

Before:

MOORE and FEINBERG, *Circuit Judges,*
and PALMIERI, *District Judge.**

ON PETITION FOR REHEARING

PER CURIAM:

Appellants Vincent Aloi and Ralph Lombardo have urged in a petition for rehearing that the failure to charge willfulness as to Count 18 was not waived and was plain error under the law of this circuit, citing, e.g., *United States* v. *Howard*, 506 F.2d 1131 (2d Cir. 1974), and *United States* v. *Fields*, 466 F.2d 119 (2d Cir. 1972).

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* Of the United States District Court for the Southern District of New York, sitting by designation.

However, in view of Judge Knapp's charge to the jury, applying the principles of *Pinkerton* v. *United States*, 328 U.S. 640 (1946), and in view of the broad definition of "use" we have earlier approved, 511 F.2d at 599-600, we do not agree that there was plain error.

The petition for rehearing is denied.

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1144, 1150—September Term, 1973.
1159, 1171

(Argued June 24, 1974 Decided January 31, 1975.)

Docket Nos. 74-1220, 74-1278
74-1614, 74-1727

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

VINCENT ALOI, JOHN DIOGUARDI,
RALPH LOMBARDO and JOHN SAVINO,

Defendants-Appellants.

Before:

MOORE and FEINBERG, *Circuit Judges*, and
PALMIERI,* *District Judge.*

Appeal by appellants from judgments of conviction of conspiracy to violate certain securities laws (all appellants), of use of a false and misleading offering circular (all appellants), and of wire fraud (Appellants Aloi, Dioguardi and Lombardo) entered after a jury trial in the United States District Court for the Southern District of New York, Hon. Whitman Knapp, *Judge.*

* Of the Southern District of New York, sitting by designation.

Affirmed as to Appellants Aloi, Dioguardi, and Lombardo and reversed as to Appellant Savino.

KRISTEN BOOTH GLEN, New York, N.Y. (Michael Ratner, of Counsel), *for Appellant Aloi.*

GRETCHEN WHITE OBERMAN, New York, N.Y. (Jay Goldberg, of Counsel), *for Appellant Dioguardi.*

JOEL A. BRENNER, Mineola, N.Y. (Gustave H. Newman, New York, N.Y., of Counsel), *for Appellant Lombardo.*

GERALD L. SHARGEL, New York, N.Y. (La Rossa, Shargel & Fischetti, of Counsel), *for Appellant Savino.*

BANCROFT LITTLEFIELD, JR., Assistant United States Attorney (Paul J. Curran, United States Attorney for the Southern District of New York, Alan R. Kaufman, T. Gorman Reilly, Peter I. Truebner, Daniel Beller, S. Andrew Schaffer, Assistant United States Attorneys, of Counsel), *for Appellee.*

MOORE, *Circuit Judge:*

Vincent Aloi, John Dioguardi, Ralph Lombardo and John J. Savino were convicted under Count 1 of conspiracy to violate federal securities laws. 15 U.S.C. §§ 77q(a), 77s(a), 77x, 17 C.F.R. §§ 230.256 and 240.10b-5, 18 U.S.C. §§ 371, 372. All four were also convicted under Count 18 of use of a false and misleading offering circular. Aloi (Count 10), and Dioguardi and Lombardo (Count 9) were convicted of wire fraud. All defendants appeal. For the

reasons hereinafter stated, we affirm the convictions of Aloi, Dioguardi and Lombardo and reverse the convictions of Savino.

The various appellants raise so many points of alleged reversible error, the separate points of each being incorporated by reference by the others, that some initial general analysis and sifting of the facts must be made.

The main charge, Count 1, alleges a conspiracy, the object of which was unlawfully, wilfully and knowingly to offer and to sell to the public common stock of a company, At-Your-Service Leasing Corp. (AYSL), which was in a weak financial condition and consistently operated at a loss. The original purpose of the financing was to raise money for AYSL to enable it to pay off loans on which certain of the defendants who owned AYSL were personally obligated and to raise additional funds to carry on the business.

A conspiracy of this nature resembles a mosaic or a jig-saw puzzle. The picture consists of a myriad of individual pieces which when placed together reveal the ultimate image. Many artisans are frequently required, each contributing his segment. Despite the number of separate participants, it is one picture. And so here. An effort will be made sketchily to portray the part each appellant-conspirator and certain co-conspirators played.

At all relevant times, AYSL was an automobile leasing corporation doing business in West New York, New Jersey. Its owners and managers were defendants Sanford L. Price, Arthur Ferdinand, Murray A. Handler, J. Jack Ganek, and Edmund Graifer.[1] Defendants Andrew Nelson[2] and Gerald Miller[3] conducted business as Tech-Ec Systems

1 Price, Ferdinand, Handler and Ganek were also certified public accountants. They were indicted but their trial was severed.

2 Nelson was indicted and pleaded guilty.

3 Miller pleaded guilty.

(financial consultants). Miller was also an attorney.

In and subsequent to July 1969, Nelson, a financial consultant (Tech-Ec) agreed with the principals of AYSL to arrange an AYSL stock issue for a $20,000 fee. The issue was to be an unregistered exempt (Regulation A) issue of 100,000 shares at $3 a share, 50,000 shares of which had to be sold within 90 days of the SEC effective date, April 8, 1970, or the subscribed money refunded.

An offering circular was prepared by Nelson and Miller dated as of April 8, 1970. Apparently a broker-dealer, TDA Securities, Inc., whose principals were defendants Gilbert C. Dragani, Donald Fisher and Louis Nova,[4] was ostensibly supposed to be the underwriter. The offering circular was most explicit. In bold type on the first page it stated: "THESE SHARES INVOLVE A HIGH DEGREE OF RISK." Under "Risk Factors to be Considered," were listed seventeen factors, any one of which should have deterred a prospective purchaser from buying the stock. And until the conspiracy commenced, no one did.

To summarize briefly, at this point there was an offering circular under which $300,000, less proper expenses, could potentially be obtained from the public. Graifer's and AYSL's financial conditions were such that they needed money by fair means or foul. Fair means having failed, they chose to investigate the possibilities of the other alternative.

There being no AYSL stock sales, Graifer as an owner and manager was called upon by his associates to remedy the situation. From this point on, the pieces of the mosaic began to be filled in rapidly. Graifer had a friend, Ralph Lombardo, and another friend in Florida, Sebastian Aloi,[5]

4 Dragani, Fisher and Nova were indicted and pleaded guilty.

5 Sebastian Aloi, originally indicted, was severed for health reasons prior to trial.

father of Vincent Aloi.[6] Graifer and Lombardo went to Florida to consult with Sebastian. Sebastian instructed Lombardo to get in touch with a Michael Hellerman, a well-known stock swindler, to see if he could put the sale across. Hellerman was associated with defendant John Dioguardi, who owned a percentage of Hellerman's profits.

Thereafter, Lombardo, to whom Hellerman owed $10,000 on a loan, approached Hellerman, who agreed, after seeing the offering circular, to sell 50,000 shares provided he received a secret kickback of $45,000, "under the table", half of which, he said, had to be paid immediately in order to bribe brokers to tout the stock.

Lombardo and Hellerman then proceeded to Dioguardi's office to obtain Dioguardi's approval of Hellerman's participation therein, which was granted. Lombardo, Hellerman and Dioguardi then telephoned Sebastian in Florida and informed him of the terms. Thus, there was a guarantee by Sebastian of Graifer's performance and by Dioguardi of Hellerman's.

About the middle of June, because Graifer was unable or unwilling to pay the required $22,500, Lombardo produced and delivered $22,500 (half of the $45,000) to Dioguardi's office.[7] By July 7th, the expiry date for the sale of the 50,000 shares, Hellerman, despite his previous successes, had failed to cause the stock to be sold. Accordingly, Dioguardi returned the $22,500 to Lombardo.

Somewhat collateral to the stock sale but definitely related thereto was an incident which brought three additional defendants into the picture, Pasquale Fusco,[8] John

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6 Because of the two Alois, first names will be used to identify them.

7 Details of delivery of $22,500 to a defendant Ira Schultz in an abortive attempt to induce him to try to sell the stock and the return of $22,000 thereof are omitted.

8 Fusco became ill during the trial and was severed.

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Savino and Vincent Aloi, Sebastian's son. Hellerman in a previous unsuccessful stock deal had lost $10,000 belonging to Fusco and Savino. They were apparently without power to obtain its return without the aid of Dioguardi. Fusco and Savino were friends of Vincent and through an Aloi-Dioguardi arrangement, Hellerman was to pay the $10,000 when financially able to do it. When Fusco and Savino learned that Hellerman was going to receive $45,000 without making any provision to pay them, Fusco said that he would see Vincent to obtain his aid in getting their money back. This development temporarily halted any efforts to sell AYSL stock but Graifer, who was most seriously affected by the stoppage, again went to Florida, saw Sebastian and explained the difficulty. Sebastian told him not to worry, telephoned his son, Vincent, and although he spoke to Vincent in Italian, immediately thereafter told Graifer in English that everything would be straightened out and that Hellerman and the stock deal would be reinstated. Hellerman was informed by Dioguardi that he could continue with his scheme but that Vincent had specified some variation in the former terms. Out of Hellerman's $45,000, Fusco and Savino were to receive $10,000, Hellerman was to repay Lombardo the $10,000 loan and Dioguardi was to receive the $25,000 balance.

Despite the passing of July 7th, the expiry date for the legal sale of the stock, money came in from sales effected by Hellerman and his henchmen, namely, brokers engaged by him.

On July 28, 1970, some three weeks after the legal expiry date, a purported "closing" under Hellerman's supervision took place. Present were Lombardo, Hellerman, Graifer, Ferdinand (a principal of AYSL), Nelson and Winter (Hellerman's attorney). Hellerman produced $150,000 in checks (50,000 shares at $3 a share), some bogus and some

not honored. Hellerman arranged to have TDA backdate its records to July 7th to give an appearance of legality. Subsequently these checks to the extent of $127,500 became good.

In August 1970 Graifer, from the proceeds, delivered the $45,000 to Lombardo. Lombardo passed it on to Dioguardi. Dioguardi then gave $20,000 of this sum to Vincent who then distributed $10,000 to Fusco and Savino and $10,000 to Lombardo. The remaining $25,000 Dioguardi used to repay that amount on an indebtedness owed by him and Hellerman. This manner of this distribution was thereafter confirmed, each to the other, including Graifer.

Concerning activities after these events, it is sufficient to say that Hellerman, consistent with his reputed skill in this sort of activity, then conducted a series of spurious manipulations in the AYSL stock and reported them at least to Graifer and Lombardo.

Again to summarize, what had started as an effort to raise money for AYSL had been taken over by Hellerman, Lombardo, Vincent Aloi and Dioguardi as a scheme to obtain money from the public via the sale of AYSL stock for their own use and purpose without disclosure of this fact to the purchasers.

Before embarking on a more detailed analysis of the many points raised by appellants' counsel, some comment upon the trial must be made based upon an appellate perspective as obtained from the record. The trial lasted for over eight weeks. The transcript was almost 6000 pages, of which hundreds of pages were devoted to colloquy between court and counsel. The four appellants were represented by experienced defense lawyers whose seizure of every opportunity technical and otherwise on behalf of their clients in aid of their defense bespeaks the adequacy

of their representation. Scores of motions for a mistrial are sprinkled throughout the record.

Fundamentally the case resolved itself into a question of witness credibility. The government's principal witnesses were Graifer and Hellerman. Their criminal records were well known. Following usual trial strategy technique, the government on its direct examination brought out much of their past records hoping to ameliorate, and soften if possible, the attack on cross-examination. Defense counsel thereafter devoted a high percentage of their time in establishing that these two witnesses, particularly Hellerman, had committed many crimes, in Hellerman's case stock swindles, check forgeries, tax evasion, frequent perjury, even ordinary stealing. Graifer, too, was "Graifer, the thief, the self-confessed perjurer." (Tr. 5066).

The government in turn introduced an agreement it had made with Hellerman under which he purportedly committed himself to tell the truth in exchange for many leniencies and financial benefits—of which more later.

Defense counsels' conception of the issues on the trial is best obtained from their own summations. To one defense counsel there was "no question of the fact that Mr. Hellerman and his cohorts perpetrated a swindle upon the public and cheated innocent victims." (Tr. 5066). To another there was "no dispute that there were criminal acts committed in connection with the stock fraud of At-Your-Service Leasing." (Tr. 5184). And all, during trial and summation, devoted a large portion of their efforts to demonstrating that Graifer and Hellerman were completely unworthy of belief. Belief or disbelief, being solely a jury function, the only law question is: was the jury given proper instructions for its determination? Factually, were appellants so tied into Hellerman's swindle as to constitute a conspiracy?

Corollary to the main issue of conspiracy are the questions of the conduct of the prosecution in establishing it and the sufficiency of the trial court's charge in outlining the factual issues to be determined by the jury.

The reviewing problem has not been rendered easier of solution by the government's brief. With little supporting proof the government assumes two groups, the Aloi and the Dioguardi, reminiscent of the Montagues and the Capulets, each group being charged with having entered into an agreement with the other to perpetrate the sale of worthless AYSL stock to the public (Govt. Br. p. 5). Its hyperbole in description is in many instances unsupported by the record or by any record references justifying its statements.

For this reason and because of the many appellate points raised by appellants' counsel, a detailed analysis of the entire record has been required. In so doing, it must be remembered that every departure from normal courtroom procedure does not constitute reversible error. And trial strategy should be left in the hands of counsel, who in this case ranked amongst the ablest of the criminal defense bar.

Probably no criminal charge is more difficult of definition than conspiracy. In short, there must be a conspiracy to commit a crime. Conspiracy itself has been defined as an agreement or a concert of action. Individuals, about to commit a crime, however, do not sit down and draft their agreement with the meticulousness of a corporate mortgage. Therefore, the conspiracy must most frequently be upon the facts and words of the alleged conspirators or the inferences drawn therefrom.

The conspiracy charged is that the defendants "did combine, conspire, confederate and agree together and with each other to commit certain violations of federal law, to wit, violations of Title 15, United States Code, Sections

77q(a), 77s(a), 77x and 17 C.F.R. §§ 230.256 and 240.10b-5." As "Objects of the Conspiracy", the indictment in substance alleged that as a part of the conspiracy the defendants would offer AYSL stock for sale, by means of communication in interstate commerce, employ schemes to defraud, obtain money by means of untrue statements and omissions of material facts and engage in practices which would operate as a fraud and deceit upon the purchasers of AYSL stock in violation of 15 U.S.C. § 77q(a). Also as parts of the conspiracy were alleged the use of a false and misleading offering circular (15 U.S.C. § 77s(a) and Rule 256(e), 17 C.F.R. § 230.256(e) and Form 1A, Schedule I), and the employment of manipulative devices in connection with the purchase and sale of AYSL stock (Rule 10b-5, 17 C.F.R. § 240.10b-5).

As "Means of the Conspiracy," the facts by which the defendants and co-conspirators would and did carry out the conspiracy and which are to some extent outlined herein, were set forth in the greatest detail.

We turn now to the principal errors asserted by the individual appellants.

Lombardo:

Lombardo challenges the sufficiency of the evidence to establish that he was a knowing member of a conspiracy to violate the securities laws of the United States.

A conspiracy to be criminal must, of necessity, encompass a crime. As the trial court charged, the jury could find a defendant guilty of conspiracy or aiding and abetting only if it were established that he knew of the unlawful purpose of the conspiracy. There is more than sufficient proof in the record from which a jury could have found or inferred the following facts with respect to Lombardo.

Graifer and Lombardo were friends. When the desired sales of AYSL stock were apparently not capable of being made, Graifer turned to Lombardo for help. Lombardo

knew of the hopeless financial condition of the company because Graifer had given him an offering circular disclosing it. Together they went to Florida to seek Sebastian's suggestions. Sebastian suggested Hellerman, who was represented as being "with" or in partnership with Dioguardi, and said that if Hellerman could do the deal Sebastian would contact Dioguardi. Upon their return to New York a meeting with Hellerman was arranged at which the offering circular was shown to Hellerman. Hellerman then regaled Lombardo and Graifer with his other stock swindles. Hellerman indicated that he could do the deal if Dioguardi approved but demanded $45,000 "under the table" for himself. He claimed that he needed 50% of this amount in advance ("up front") to bribe brokers to tout the stock. Lombardo also demanded from Grailer to be put on the AYSL payroll at $200 a week and free use of AYSL cars and credit cards.

Lombardo and Hellerman then proceeded to Dioguardi's office where, after a further discussion all three, Lombardo, Dioguardi and Hellerman, by telephone told Sebastian in Florida of their agreement.

It was Lombardo who delivered the $22,500 to Dioguardi, who in turn told Hellerman and Kelsey to give it to Schultz who was going to try to sell the stock. Schultz had no success and the money was returned, Lombardo being present at the time. Hellerman then told Lombardo that he could do the deal without the advance money.

A new deal was arranged for the distribution of the $45,000 which Vincent approved and which was known to Lombardo whereby Fusco and Savino were to receive $10,000, Lombardo $10,000 and Dioguardi $25,000, which Dioguardi applied on account of a debt.

At the purported closing held on July 28, 1970, at which funds represented by Hellerman as obtained from the sale

of the stock in the amount of $127,500 were displayed, Lombardo was present.

Lombardo thus occupied a key role in Hellerman's swindle from the initial meeting down to the closing. He participated in most of the meetings with Dioguardi to promote the swindle and had a definite monetary stake therein, including his $200 a week from AYSL and other emoluments plus his $10,000, paid out of the $45,000. And Lombardo's telephone call to Sebastian was both in furtherance and in execution of the scheme in that Sebastian had to approve or confirm the deal. We conclude therefore that there was ample evidence to support Lombardo's conviction under Count 1.

Lombardo claims that Hellerman's testimony of a $10,000 loan by Lombardo to Hellerman at a highly usurious rate of interest was so prejudicial as to deprive him of a fair trial. A count (count 38) based upon this loan had been severed and Lombardo contends that no reference should have been made to it.

There is no question but that Lombardo received repayment in the amount of $10,000 out of the proceeds of Hellerman's swindle. To this extent testimony concerning the loan was admissible. Furthermore, its existence could have justified an inference that it might have been an influencing factor in Lombardo's participation in the conspiracy.

To refute the denial by Lombardo of the Hellerman loan the government introduced evidence of many other loans made by Lombardo to others. These loans were alleged to appear on certain lists in Lombardo's handwriting. Admission of these lists for cross-examination purposes may have been proper as an attack on credibility. Whether the government intended this restrictive purpose or introduced the lists to prove Lombardo a loanshark

is debatable. However, the court in its charge endeavored to confine the admission to a credibility issue.

Lombardo charges that the government sought to degrade him in the eyes of the jury by revealing his extramarital relationship with a young lady. However, this testimony was properly adduced in light of his presentation of himself as a family man.

Lombardo also claims that information obtained from his testimony given before a State Grand Jury in Nassau County as to which he was given immunity formed the basis for much of his cross-examination and that the use of these "Immunized Transactions" (Lombardo, Br. 49) deprived him of a fair trial. If, however, the information revealed was either already known or came from independent sources, this argument fails. The trial court investigated the facts in an evidentiary hearing and concluded that the prosecution had not made use of such testimony. There is no basis for holding the court's ruling to have been clearly erroneous.

Dioguardi:

All the appellants, particularly as stressed in Dioguardi's brief, attack the court's charge, claiming that it was inaccurate, inadequate, and insufficient. Because the jury's duty is to weigh the facts in light of the court's instructions as to the law, attention must be turned initially to the charge itself.

The court quite accurately, though briefly, outlined "the basic criminal enterprise that the government claims to have established." (Tr. 5487-5488). It started with Graifer's AYSL financial problems, continued through his "more or less legitimate means" to unload the corporation on the public, Graifer's subsequent meetings with Sebastian, Lombardo, Hellerman and Dioguardi, their placing the stock scheme in the hands of Hellerman

and the accomplishment of the conspiracy by the unloading of the stock. In addition, the court gave a brief sketch of the respective roles which the government contended each defendant occupied, Dioguardi authorizing Hellerman to proceed and supervising his conduct, Vincent entering the conspiracy to take care of the Fusco-Savino claim against Hellerman, Savino to have his claim satisfied, and Lombardo, the original negotiator to "more or less run herd on the operation."

The jury was told briefly but adequately that the crime of conspiracy is "substantially as follows":

> If two or more persons, any two, conspire to commit any offense against the United States and one or more of such persons does any act to effect the object of the conspiracy, each shall be guilty of a crime. (Tr. 5490-91).

Three elements were stated: (1) conspiracy; (2) an object —namely, commission of an offense against the United States; and (3) an act to effect the unlawful objective. The court then proceeded by asking "What is a conspiracy" and answered the question by saying "A conspiracy in ordinary layman's language is no more or less than a common understanding entered into between two or more persons to achieve an unlawful objective." (Tr. 5490).

A "vice" of the court's charge, according to Dioguardi, lies in these words:

> ". . . I advise you as a matter of law that the objectives of this conspiracy as described by the government, namely, obtaining moneys from the public by fraudulently pumping worthless securities into the ordinary channels of commerce could not be accomplished without violating the above-mentioned statutes and you would be entitled to conclude that any de-

fendant whom you find to have intended such objectives, must have contemplated the violation of those statutes." (Tr. 5492).

This was followed with the admonition that if a conspiracy were found that "all of them become guilty of any criminal act performed in the furtherance of that conspiracy, whether or not any of them individually had anything to do with that particular unlawful act or even knew of its existence." (Tr. 5494).

This charge, argues Dioguardi, in effect constitutes an amendment of the indictment in that the jury could have found Dioguardi guilty if "he [Dioguardi] associated himself with Hellerman in an on-going scheme, beginning in 1969, to obtain money from the public in fraudulent security transactions, even though the grand jury did not frame the conspiracy count in this fashion." (Dioguardi Br. 33).

This argument is tied in with, and dependent upon, his claim of error in the admission of proof that beginning in 1969 Dioguardi had 25% (raised to 50% in the *Belmont* [a previous Hellerman stock swindle] stock fraud) of everything Hellerman did and of proof to a limited extent of the *Belmont* deal. Dioguardi's claim that the injection of Hellerman's *Imperial* and *Belmont* frauds into the case thereby allegedly forced him to defend himself in three separate trials is not well founded. None of the issues in those cases was before the jury here. And despite protracted colloquy between court and counsel as to whether the outcome of those cases should be presented to the jury, it was not.

The trial court's charge, according to Dioguardi, did not accurately define the offenses (Counts 1 and 18) and their respective elements. His criticism is that the court did not read the applicable statutes to the jury but merely stated

that if they found certain facts then the crime charged had been committed as a matter of law, citing *Morris* v. *United States*, 156 F.2d 525 (9th Cir. 1946), and *United States* v. *Levy*, 153 F.2d 995 (3rd Cir. 1946). In particular, Dioguardi claims that the court should have defined the terms "fraudulent", "material" and "undisclosed underwriter" and should have been charged that any material omissions from the offering circular had to be willful.

Criticism is also levelled at the brevity of the court's charge. This was a long trial; the jury had heard and seen many witnesses. At the conclusion of the trial they must have had a fairly good idea as to the issues. The summations of the four counsel for the four defendants and the government highlighted the salient contentions. The value to a jury of a four or five hour charge will undoubtedly be a subject for judicial debate for years to come. The so-called "boiler plate" section of the charge has been built up over the generations to a highly disproportionate size by adding the omissions held to have been error by appellate courts in their decisions over the years. An attempt at brevity is now characterized as "plain error" —a term of art tantamount to saying that a defendant has not had a fair trial.

If error is "plain" one might well ask: plain to whom? Apparently not to the experienced defense counsel during the trial. These counsel were given by the court a copy of its charge in another similar case and advised by the court that it proposed to give a somewhat similar charge as to the substantive counts. Rule 30, F.R.Cr.P. must be given some meaning. Its purpose is obvious, namely, to give the trial judge an opportunity to remedy any defects which counsel believe may exist.

Dioguardi claims error as to him in the introduction of an alleged partnership agreement with Hellerman whereby

he was entitled to a certain percentage of Hellerman's profits obtained through his swindles. Such proof did not constitute a varinnce from the indictment or introduce prejudicial evidence of other unrelated crimes. The relationship with Hellerman and Dioguardi had to be developed to show Dioguardi's place in the AYSL stock fraud. Witness: Graifer's question to Sebastian when Hellerman's name was mentioned as to how and why Dioguardi was involved. (Tr. 477). The evidence, as well outlined in Dioguardi's brief, discloses a close relationship to the AYSL swindle from the initial time when Hellerman said he had to consult Dioguardi before he could proceed with the deal through the various meetings at his office, his various telephone calls to Sebastian and his interest in keeping his hands on the pursestrings of $45,000 of the proceeds.

Aloi:

Aloi (Vincent) would have his participation limited to an effort to help his friends, Fusco and Savino, obtain payment of the alleged indebtedness of Hellerman to them. However, the proof and the reasonable inferences therefrom lend themselves to factual conclusions quite beyond any such restricted purpose and activity. When Vincent was informed that Fusco and Savino had not been provided for out of Hellerman's $45,000, he must have known the details as to its proposed source and must have communicated with Lombardo on the subject. He was a definite participant through orders to Lombardo to obtain the return of the $22,500 (half of the $45,000) given to Hellerman.

The telephone call from Sebastian in Florida to Vincent in Suffern, N.Y. is not without significance, and from the consequences thereof the jury would have been justified in believing that the subject matter of the conversation was not limited to the merits of Florida weather. Graifer had

gone to Florida to complain about the interruption of the stock deal purportedly by Fusco and Savino. Sebastian, although speaking in Italian to Vincent, at the conclusion of the call said in English "everything will be straightened out"—and indeed it was. Hellerman was reinstated but the terms of the $45,000 payment were altered. The terms (there was testimony that Dioguardi told Hellerman that he could proceed on new terms set by Vincent) called for a distribution at the end of the deal by Vincent and Dioguardi who would pay $10,000 to Fusco and Savino; and $10,000 to Lombardo. The remaining $25,000 Dioguardi used in payment of an unrelated indebtedness.

Vincent was obviously interested in the outcome of the stock sale ("He just wanted to know what was going on." Tr. 1860) He knew that the stock issue was to be the source of the money with which the conspirators were dealing and when he heard that Hellerman had actually sold more than 50,000 shares of AYSL stock said that he would take the matter up with Dioguardi. Vincent's argument that the proof shows (at the "very worst") only that he "knew that some kind of stock swindle was going on," ignores the many facts establishing that he participated in keeping the swindle going and that through his hands passed much of the proceeds thereof.

At the July 28, 1970 closing Lombardo was there "to report back to Vinny (Aloi) how everything was going." At the closing Hellerman was told by Lombardo to get in touch with Dioguardi and that Vincent and Dioguardi would "straighten out the money" (Tr. 1864). When the money became available Graifer received $45,000 which he delivered to Lombardo, who in turn delivered it to Vincent for the distribution above described. Each of the beneficiaries on various occasions thereafter acknowledged their benefactions to one or more of the other defendants.

Conversations concerning the stock deal between Vincent, Lombardo and Graifer continued through 1970 and into early 1971.

Vincent's present contention that there were multiple conspiracies and that his only participation in the events related to an endeavor to retrieve $10,000 for his friends is belied by the evidence.

Vincent claims that he was unconstitutionally prevented from taking the stand because the trial judge had ruled in advance that a state court perjury conviction (then on appeal) could be used to impeach him. (Whether he would have taken the stand is conjectural. No offer of proof was submitted by his counsel.)

Apparently the circuits are in conflict on the impeachment use of a non-final (namely, still on appeal) conviction. This circuit has recently considered the question in *United States* v. *Soles*, 482 F.2d 105 (2d. Cir.), *cert. denied*, 414 U.S. 1027 (1973) in which Judge Friendly analyzed the merits of the conflicting views. In both *Soles* and this case the previous conviction was closely related to credibility (in *Soles*, bribery; here perjury). We, therefore, continue to adhere to the rule that the trial judge has discretion to allow the use for impeachment purposes of a conviction under appeal and for the reasons stated in *Soles*.

Vincent also claims that the indictment was unlawfully amended by the addition of some twenty alleged co-conspirators on the eve of the trial. Such a practice is not to be commended but on appellate review the question is: how were the defendants prejudiced thereby? Of the added co-conspirators only Shustek's conversations bore upon the issues, and these were merely cumulative.

Savino:

No facts whatsoever were presented by the government sufficient to establish that Savino was a member of the conspiracy alleged in the indictment. The far-fetched and unjustifiable inferences sought to be drawn by the government in an effort to tie him into the conspiracy attest to the lack of any foundation upon which to rest his conviction. The facts surrounding Savino's involvement are clear.

Prior to the conception of the AYSL stock offering and as a result of a $10,000 loss sustained by Savino and Fusco on stock of a previous Hellerman venture (Trimatric), Hellerman had agreed to repay this amount to them when financially able to do so. There is no basis for the government's inference that Savino must have known that Trimatric was a Hellerman swindle nor was there any proof that it was. Whatever may be the reasons for Hellerman's admission of this obligation, they are irrelevant to the conspiracy here charged.

When Savino and Fusco fortuitously learned that Hellerman might be in funds (the $45,000 from the AYSL deal) they were naturally desirous of receiving the $10,000 repayment promised when Hellerman's financial condition permitted. Their knowledge of how best to apply pressure is evidenced by their turning to Vincent for his help in obtaining repayment. And it may very well be that Vincent insisted as a condition of Hellerman's proceeding with his planned stock swindle that Fusco and Savino be paid Hellerman's indebtedness to them.

To obtain a commitment for payment from Hellerman, Vincent may have temporarily stopped the AYSL deal, but this act did not inject Savino into the conspiracy. The government makes a wholly unjustified assumption that if Savino knew or suspected that Hellerman was engaging in another of his many stock swindles that fact automatically made Savino a conspiratorial participant therein. Nor

does the fact that the $10,000 was paid to Savino and Fusco out of Hellerman's ill-gotten gains place him in such a category.

The government argues that Savino knew or must have known that Hellerman's AYSL stock deal was a fraud and that "he had access to the man who ultimately stopped it and started it again, Vincent Aloi." (Gov't Br. 40). Only with restraint can this argument be characterized as a *non sequitur*.

In summary, there is no proof that Savino was a participant in any way in Hellerman's stock fraud set forth in the indictment and in the operations employed in its accomplishment. Whether he induced Vincent to aid him in the recovery of the Hellerman debt is no part of, or relevant to, Count 1 of the indictment.

Since Savino was never a member of the unlawful conspiracy alleged in Count 1, we must also reverse his conviction under the substantive Count 18. *United States* v. *Cantone*, 426 F.2d 902 (2d Cir.) *cert. denied*, 400 U.S. 827 (1970).

The Government-Hellerman Agreement:

Dioguardi and his co-appellants strongly attack an agreement made by the government with Hellerman to induce him to testify. As Dioguardi's counsel quite accurately states: "The extent of the consideration given to Michael Hellerman to induce him to testify was extraordinary." (Dio. Br. p. 55)—and indeed it was. He had swindled the public out of millions of dollars; he had failed to pay income taxes; he had promised as a condition of leniency to refrain from further criminal activities, which promise he broke. Even when pretending to be in the government camp he was surreptitiously engaging in further swindles, brazenly admitting that "I thought I could get

away with giving information to the government and making money on the side." (Tr. 2377).

But the government was apparently willing to forego further prosecutions and collections of large amounts of income tax to secure his testimony.

Counsel for Dioguardi argues that "any witness who takes the stand is obligated, by virtue of the oath he takes, to testify truthfully," and that as a result "no special agreement with him was necessary to secure truthful testimony." Therefore, he contends that it was highly improper for the government to argue in summation that the government's agreement with Hellerman put the imprimatur of truth upon his testimony. The government even sought to reinforce Hellerman's questionable credibility by disclosing its threat, under the terms of the agreement, to prosecute him for perjury if he testified falsely.

However, whether this incident deprived appellants of a fair trial must be considered in light of all the circumstances. The jury had seen and heard Graifer and Hellerman. They had heard appellants' counsel day after day blast their capacity for veracity. The agreement was merely one of many items to bear upon the question. It is to be doubted that an agreement could override the effect of the many unconscionable crimes which counsel paraded before the jury as perpetrated by these witnesses. Furthermore, the question of credibility was properly presented to the jury by the court.

Joint Trial With Dioguardi:

Vincent and Lombardo claim denial of due process because of prejudice resulting from being tried with Dioguardi. This prejudice could have been avoided, they claim, by the granting of a severance. In short, these defendants assert that Dioguardi's reputation as an under-

world figure and the introduction during the trial of his extensive criminal record, his continuing arrangement with Hellerman, and his associations with various other notorious persons contaminated them because of trial joinder.

During the jury *voir dire*, which required three days, the trial court allowed the defense twenty peremptory challenges and the prosecution twelve. Vincent takes exception to the court's ruling that the peremptory challenges had to be exercised unanimously rather than by allotment of separate challenges. However, prior to the use of these challenges, many jurors had been excused for cause. A jury of twelve with six alternates was finally selected. But even thereafter the trial judge personally interviewed each juror and alternate as to prejudice. Quite naturally in any multi-defendant trial there will be differences in degree of guilt and possibly degree of notoriety of the defendants. There may be some likelihood that proof admitted as to one or more defendants will be harmful to the others. However, this possibility does not necessarily justify individual trials. Faced with this situation the trial judge took every feasible step to obtain an unbiased jury.

During the trial Dioguardi and Lombardo elected to take the stand. Under such circumstances the government was entitled to inquire into their past criminal activities. Vincent, despite his protestation that "[he] and Savino played minor if not negligible roles" (Aloi Br. p. 47), took an important part in the conspiracy, particularly in the disposition of the proceeds of the fraud.

Finally as to prejudice resulting from the joint trial Vincent asserts that the charge "was totally inadequate to deal with any, let alone all, of the prejudicial testimony allowed into the trial." (Aloi Br. p. 53). Of course the trial judge could have consumed hours in analyzing every

bit of evidence which applied only to a particular defendant, but the conclusion would not have been different from the charge as given, namely, "evidence offered or admitted only (sic) one defendant should not be considered in connection with your determination of the guilt or innocence of any other defendant." (Tr. 5479).

Considering the nature of the case and the roles which each defendant played, severance was properly denied.

The Wire Fraud Counts:

Lombardo and Dioguardi attack their convictions under Count 9 on the ground that the telephone call to Sebastian was not made for the purpose of "executing" (18 U.S.C. § 1343) the stock swindle scheme but at most was "for the purpose of concocting a conspiracy" or "for the purpose of formulating a conspiracy to defraud", purposes allegedly not proscribed by the statute. There was adequate proof to rebut any assumption that the conspiracy was created or concocted in this telephone call. To the contrary the scheme had been formulated and was already in existence. Sebastian's approval, to the conspirators at least, was a required part of the scheme. The call was definitely in furtherance of the conspiracy.

Vincent's conviction under Count 10 was based upon the telephone conversation with Sebastian in June 1970. Vincent claims that the judge's charge was reversibly erroneous because he charged that any defendant "already found guilty of conspiracy" could be found guilty if the call were made "in furtherance of the unlawful scheme to defraud alleged in the indictment," (Vincent's Br. 37). This use of the words "in furtherance" instead of "in execution of" constitutes, so argues Vincent, a fatal variance. Such an argument is quite unrealistic. A single call concerning the scheme might well be an important ingredient thereof with-

out it being the complete execution thereof. In this instance, despite the Vincent-Sebastian conversation being in Italian, the purpose of Graifer's visit to Sebastian, his conversation in English as to the problems facing the stock scheme and Sebastian's statements to Graifer in English justify the inference and a jury conclusion that the use of the telephone wire was in connection with, in furtherance of and thus, in execution of, the conspiracy.

Count 18—Use of a False and Misleading Offering Circular:

The indictment alleged that the defendants "willfully used and caused to be used" a false offering circular. Vincent argues that there were no material misrepresentations in the offering circular and in any event that there was no "use" of any offering circular so far as he was concerned. He points to the fact that the circular had been filed with the SEC and become effective on April 8, 1970, and that he did not enter the conspiracy (a conspiracy is not conceded by him) until the June 1970 Florida telephone call from Sebastian. Therefore, Vincent concludes that he cannot be found guilty of committing the substantive crime (Count 18) which took place prior to his alleged entry therein. *United States* v. *Cantone, supra,* 426 F.2d at 904.

As to the argument that there was a variance between indictment and proof in that "the offering circular was never 'used' in any common sense of the term" (Aloi Br. 27), Vincent would restrict the word "use" to the delivery thereof to a purchaser or prospective purchaser prior to the sale. There is no sound basis for any such limitation. The proposed offering circular had to be filed with the SEC. On the basis of the representations therein the Reg. A exemption requested would or would not be granted. Once granted, no securities could be sold unless the cir-

cular were furnished to the prospective purchaser at least 48 hours prior to the mailing of the confirmation. To be sure, the offering circular was not used in the manner normally to be expected, namely, mailed to prospective purchasers before sale were consummated.[9] But having been filed with the SEC, it was the genesis of the subsequent plan to defraud, and, facially at least, the existence of the filed circular lent an aura of legitimacy to the scheme.

Whether the offering circular contained any false or misleading statements or any material omissions at the time of its original filing need not be resolved because when the Hellerman plan was conceived and carried out, i.e., when the circular was "used" and after Vincent had joined the conspiracy, it certainly became false. 17 C.F.R. § 230.256(e) provides: "In no event shall an offering circular be used which is false or misleading in light of the circumstances then existing." The circumstances then existing bore no relationship whatever to the circumstances existing on April 8, 1970.

The subsequent Hellerman role had not been disclosed, the appropriation of $45,000 to their own use by the con-

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9 The government states in its Brief that "the offering circulars were 'used' as well, in other ways than being mailed to purchasers," and that "There was clear circumstantial evidence that the offering circulars were sent to purchasers of AYSL stock." The statements are followed by the declaration that "at the time Hellerman mailed the offering circulars to purchasers of the stock he knew that the circular was false . . . ." (Gov't Br. 51). There is no proof in the record that Hellerman mailed or caused to be mailed an offering circular to any purchaser. Unable to supply proof or record references for these unfounded assertions, the government lamely retreats to the position that "it follows that the jury could have reasonably inferred that Hellerman sent (or gave) the offering circulars to his purchasers . . . ." (Gov't Br. 52). However, even this unwarranted assumption is undercut by the actual proof that the circulars were delivered to Nelson, who did not mail them but delivered them to Hellerman, who in turn failed to mail them. Only certain confirmations were mailed and received by purchasers.

spirators was not revealed, and the "use of proceeds" representation had been rendered completely false. Hellerman and Lombardo knew, from having had the circular in their hands, that their planned nefarious scheme was not set forth therein. Dioguardi knew of the fraudulent selling scheme because Helleman had told him of his plan.[10]

Dioguardi, Lombardo and Vincent put themselves in Hellerman's hands, as their agent, their co-conspirator or their abettor (terminology in this situation is not of the essence) to accomplish a fraud. The method used by Hellerman may have been of little interest to them, the beneficiaries, but they cannot claim to have been mere spectators watching the game from the sidelines. The proof shows that all three had their glasses trained upon the game which Hellerman was playing and that they were intensely observing, and interested in, every move.

The proof was more than adequate to justify the conclusion of a conspiracy. Nor can the conspirators escape responsibility for the acts of their co-conspirator. They chose to give Hellerman *carte blanche* to conceive, manage and carry out their fraud. Under the doctrine of *Pinkerton* v. *United States*, 328 U.S. 640 (1946), they are liable for substantive crimes committed in furtherance of the conspiracy.

That innocent people were injured by the defendants' stock swindle was a point little stressed at the trial. The prosecution was so obsessed by its two-family (Aloi-Dioguardi) hierarchical theory and its concentration of proof on the machinations relating to the division of the stock swindle proceeds, that the source of the funds to be realized from the swindle played a minor part in its

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10 Hellerman explained that he would sell the AYSL stock, first by bribing brokers, and then by having buy and sell confirmations made up showing a two-point spread to convince people to buy on the basis that they had a sure profit in the stock. Tr. 1804-06.

presentation. However, we think the victims of the plan are worthy of mention. Five witnesses were produced who testified that at the behest of Hellerman's broker-salesmen they had purchased and paid for the worthless AYSL stock. They paid by checks, which were produced along with the confirmations they had received by mail. Since it may reasonably be assumed that none of the conspirators was coming to the rescue of AYSL out of their own pockets, it would be an equally reasonable inference that the $127,500 came from illegal sales to innocent and defrauded purchasers.

The Sentences Imposed:

Vincent and Lombardo contend that their sentences were improperly imposed. Vincent was sentenced to five years on the conspiracy count (Count 1) plus a $10,000 fine, to four years (consecutive) on the false circular count (Count 18) plus a $5,000 fine, and a five-year suspended sentence plus a $1,000 fine on the wire fraud count (Count 10)—a total of nine years and fine of $16,000. Lombardo was sentenced to concurrent terms of five years on Counts 1 and 18 and a suspended five years on Count 9. He, too, was fined a total amount of $16,000. These appellants claim that hearsay material contained in the probation report and in a special sentencing memorandum submitted by the government at the request of the trial judge may have caused the judge to sentence them for offenses other than those for which they were convicted.

This court recently considered the question of a government sentencing memorandum in *United States* v. *Rosner*, 485 F.2d 1213 (2d Cir., 1973), *cert. denied*, 417 U.S. 950 (1974). The factual situation was somewhat different there in that the government submitted the memorandum *ex parte* to the court which kept it for some two months. Only

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on the day of sentencing was it disclosed. The court then denied a requested opportunity to study and rebut, if possible, the contents. Under the "unusual circumstances" (485 F.2d at 1231) of the *Rosner* case, this court remanded for sentencing before another judge. Here, however, the memorandum was put into the hands of defense counsel a week prior to sentencing. Forty-one pages of colloquy were devoted by counsel to exploring and answering the allegations therein (A. 132-173). Analysis of this colloquy reveals that defense counsel were aware of the bases for the government's recommendations and forcefully pointed out the hearsay and asserted irrelevant nature thereof.

In the Seventh Circuit case of *United States* v. *Solomon*, 422 F.2d 1110 (7th Cir.), *cert. denied*, 399 U.S. 911 (1970), the court was faced with the problem of the effect upon the mind of the sentencing judge of a confidential report on the defendant prepared by the prosecutor in connection with a proceeding for revocation of bail for the trial court's inspection *in camera*. Although the court under the particular facts of that case felt that resentencing was not required, it said:

> Hereafter in this Circuit, however, a trial court shall not consider *in camera*, a prosecutor's report about a defendant prior to sentencing or ruling on post-conviction motions unless the pertinent factual information is summarized for or disclosed to defense counsel with appropriate safeguards.

Id. at 1121 (emphasis in original).

Somewhat similar situations have been considered by the courts where there has been non-disclosure by the sentencing judge of presentence reports or other information regarding a defendant from prosecutor to court. If disclosure of a presentence report under appropriate circum-

stances be important, how much more so is the disclosure of a memorandum prepared by the prosecutor containing not only accusations of other crimes but also his own opinion as to the sentences. See generally the discussion of the subject in *Rosner, supra; United States* v. *Brown,* 470 F.2d 285 (2d Cir. 1972); *United States* v. *Malcolm,* 432 F.2d 809 (2d Cir. 1970); *Haller* v. *Robbins,* 409 F.2d 857 (1st Cir. 1969); *United States* v. *Fischer,* 381 F.2d 509 (2d Cir. 1967), *cert. denied,* 390 U.S. 973 (1968). Although a document such as this prosecutor's memorandum may not be utilized by the judge *in camera,* here there was full disclosure and an equally full opportunity to rebut.

The court's sentences here were within the permissible sentences for the crimes charged and we find no reversible error in the sentencing procedure.

Electronic Surveillance:

Pursuant to an order of the trial court dated November 21, 1973, the United States Attorney for the Southern District of New York by letter dated November 29, 1973, specifically inquired of the Assistant Attorney General, Criminal Division, as to any conversations overheard or intercepted by electronic surveillance in which the defendants Vincent, Dioguardi, Lombardo, Savino or Fusco were parties. The reply was negative except as to an October 2, 1964, conversation monitored by the FBI at which Dioguardi was present. Further inquiry revealed nothing thereafter. The Department of Justice in its search covered the Internal Revenue Service, the United States Postal Service, the United States Secret Service, the Bureau of Alcohol, Tobacco and Firearms, the Drug Enforcement Administration, the Bureau of Customs, the Central Intelligence Agency, the United States Department of Labor, the United States Department of Defense and the United States Department of State.

The trial judge was duly notified of the negative results of the requested inquiry. Copies of the correspondence between the United States Attorney, the Department of Justice and the trial judge were sent to all appellate counsel. We find that this inquiry constitutes full compliance with the trial court's order and with the principles enumerated in *United States* v. *Smilow*, 472 F.2d 1193 (2d Cir. 1973).

Other Allegedly Prejudicial or Irrelevant Testimony:

Appellants contend that the prosecution intentionally introduced inflammatory testimony with no object other than to prejudice the jury against the defendants. The use of nicknames was brought out, e.g., Charles San Filippo, as "Charlie Lamb Chops", Vincent as "Big Vinny", Philip Yovanovich as "Philly Rags", Fusco as "Checko Brown". The fraudulent broker, Gary Fredericks, was identified as a brother-in-law of Sonny Franchese, a rather publicized criminal. References were also made to Jimmy Hoffa and the Teamsters Union. Although this prosecution practice is to be condemned, the expressions, whether they be nicknames or underworld words of art (e.g., "sit-down", "with", "honorable man", "audience" and "hangout") will not be presumed to have had such contaminating significance in the minds of the jurors as to have deprived the defendants of a fair trial. Both prosecution and defense counsel were dealing with defendants and witnesses who in many instances had been steeped in crime. For their respective advantages counsel did not minimize this fact. The witnesses frequently resorted to their own jargon. Our task is to try to estimate its effect on the jury in light of a resolution of the "fair trial" question. Of necessity this appraisal must be made on the basis of its effect upon this court. Against the background of an eight weeks' trial

with scenes frequently emotional, we do not believe that these epithets occasionally interspersed throughout the testimony materially diverted the attention of the jury away from their task.

Conclusion:

In final analysis the question to be answered, after a review of the indictment, the appendix, the transcript and the voluminous briefs of all four appellants, is: have they had a fair trial? The indictment put them on notice as to the charges against them. For eight weeks appellants concentrated upon the lack of credibility on the part of their accusers. They did not seriously question Hellerman's stock swindle—only their connection therewith. The court's charge, although it could have defined and stressed the elements of the crimes charged in the various counts with greater specificity, adequately presented the factual issues for jury determination. For these reasons we affirm the judgments of conviction as to appellants Lombardo, Dioguardi and Vincent Aloi and reverse as to appellant Savino.

APPENDIX C

15 USC § 77s(a). Special powers of Commission

(a) The Commission shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this subchapter, including rules and regulations governing registration statements and prospectuses for various classes of securities and issuers, and defining accounting, technical, and trade terms used in this subchapter. Among other things, the Commission shall have authority, for the purposes of this subchapter, to prescribe the form or forms in which required information shall be set forth, the items or details to be shown in the balance sheet and earning statement, and the methods to be followed in the preparation of accounts, in the appraisal or valuation of assets and liabilities, in the determination of depreciation and depletion, in the differentiation of recurring and nonrecurring income, in the differentiation of investment and operating income, and in the preparation, where the Commission deems it necessary or desirable, of consolidated balance sheets or income accounts of any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer; but insofar as they relate to any common carrier subject to the provisions of section 20 of Title 49, the rules and regulations of the Commission with respect to accounts shall not be inconsistent with the requirements imposed by the Interstate Commerce Commission under authority of such section. The rules and regulations of the Commission shall be effective upon publication in the manner which the Commission shall prescribe. No provision of this subchapter imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule

or regulation of the Commission, notwithstanding that such rule or regulation may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

15 USC § 77x. Penalties

Any person who willfully violates any of the provisions of this subchapter, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this subchapter, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both.

May 27, 1933, c. 38, Title I, § 24, 48 Stat. 87.

Rule 256(a)-(e); 17 C.F.R. 230.256(a)-(e). Filing and use of the offering circular

(a) Except as provided in paragraph (c) of this section and in § 230 257—

(1) No written offer of securities of any issuer shall be made under §§ 230.251 to 230.262 unless an offering circular containing the information specified in Schedule I of Form 1-A is concurrently given or has previously been given to the person to whom the offer is made, or has been sent to such person under such circumstances that it would normally have been received by him at or prior to the time of such written offer; and

(2) No securities of such issuer shall be sold under this regulation unless such an offering circular

is furnished to the person to whom the securities are expected to be sold at least 48 hours prior to the mailing of the confirmation of sale to such person, or is sent to such person under such circumstances that it would normally be received by him 48 hours prior to his receipt of confirmation of the sale; *Provided,* however, if the issuer is required to file reports pursuant to section 13(a) or 15(d) of the Securities Exchange Act of 1934, as amended, the offering circular may be furnished with or prior to the confirmation of sale.

(b) In the case of transactions effected on a securities exchange, delivery of the offering circular shall be deemed to have been made if prior to such transactions a reasonable number of copies of the offering circular have been furnished to the exchange for delivery to any person or persons requesting copies thereof.

(c) Any written advertisement or other written communication, or any radio or television broadcast, which states from whom an offering circular containing the information specified in Schedule I of Form 1-A may be obtained and in addition contains no more than the following information may be published, distributed or broadcast at or after the commencement of the public offering to any person prior to sending or giving such person a copy of such circular:

(1) The name of the issuer of such security;

(2) The title of the security, the amount being offered, and the per-unit offering price to the public;

(3) The identity of the general type of business of the issuer; and

(4) A brief statement as to the general character and location of its property.

(d) The offering circular may be printed, mimeographed, lithographed, or typewritten or prepared by any similar process which will result in clearly legible copies. If printed, the body of the offering circular and all notes to financial statements and other tabular data included therein shall be in roman type at least as large and as legible as 10-point modern type. However, to the extent necessary for convenient presentation, financial statements and other tabular data, including tabular data in notes, may be set in type at least as large and as legible as 8-point modern type. All such type shall be leaded at least 2 points.

(e) If the offering is not completed within nine months from the date of the offering circular, a revised offering circular shall be prepared, filed and used in accordance with these rules as for an original offering circular, except that in the case of offerings under stock purchase savings stock option or other similar plans for the benefit of employees, if the offering is not completed within 12 months from the date of the offering circular, a revised offering circular shall be prepared, filed and used in accordance with these rules as for an original offering circular. In no event shall an offering circular be used which is false or misleading in light of the circumstances then existing.

Supreme Court, U.S.
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No. 75-357

In the Supreme Court of the United States

OCTOBER TERM, 1975

VINCENT ALOI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-34a) is reported at 511 F.2d 585. The opinion of the court of appeals denying a petition for rehearing (Pet. App. 1a-2a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1975. A timely petition for rehearing was denied on July 7, 1975 (Pet. App. 1a-2a).

On July 28, 1975 Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including September 5, 1975, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court adequately instructed the jury as to the elements involved in "willful" "use" of an offering circular for shares.

2. Whether the district court must allow a defendant a full adversarial hearing concerning factors taken into consideration in imposing sentence.

STATUTES AND REGULATIONS INVOLVED

15 U.S.C. 77s(a) and 77x, and 17 C.F.R. 230.256 (e), are set out at Pet. App. 35a-38a.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of wire fraud, in violation of 18 U.S.C. 1343 (Count 10), willful use of a false and misleading offering circular for the sale of securities, in violation of 15 U.S.C. 77s, 77x and 17 C.F.R. 230.256 (Count 18), and conspiracy to commit these offenses, in violation of 18 U.S.C. 371 (Count 1). He was sentenced to consecutive terms of five years' imprisonment on Count 1 and four years' imprisonment on Count 18; a term of five

years' imprisonment imposed on Count 10 was suspended in favor of five years' probation. All sentences run consecutively to a previously imposed state sentence. Petitioner was fined $10,000 on Count 1, $1,000 on Count 10, and $5,000 on Count 18. The court of appeals affirmed (511 F.2d 585; Pet. App. 3a-34a).

The evidence introduced during the lengthy trial is summarized by the court of appeals. There was a complicated conspiracy to sell to the public common stock of At-Your-Service Leasing Corp. (AYSL), which was in a weak financial condition. AYSL planned a public offering of 100,000 shares at $3 a share, 50,000 shares of which had to be sold by July 7, 1970, within 90 days of the date upon which AYSL filed with the Securities and Exchange Commission an offering circular and other papers designating the issue as an unregistered offering (Pet. App. 5a, 6a).

An offering circular was prepared. Because it demonstrated the precarious financial posture of AYSL, no one offered to purchase the shares. In order to rectify this problem, the conspirators engaged Michael Hellerman, a notorious stock swindler, to see whether he could sell the stock. Hellerman, after seeing the offering circular, agreed to sell 50,000 shares of stock in return for $45,000, half of which was to be paid immediately in order to bribe brokers. Hellerman's involvement was arranged with the help of conspirators Sebastian Aloi (petitioner's father), John Dioguardi (who "owned" part of Hellerman's profits), and others (*id.* at 6a-7a).

Shortly after the scheme was put into operation, Pasquale Fusco and John Savino learned of Hellerman's expected profit and became disgruntled because Hellerman had not arranged to repay them a debt of $10,000. Fusco told Hellerman that he (Fusco) would contact petitioner to help them get their money, and Hellerman desisted in his efforts to sell the stock. When Edmund Graifer, one of the principals of AYSL, protested to petitioner's father, Sebastian Aloi, the latter told Graifer not to worry and called petitioner. Immediately after the conversation (which was in Italian), Sebastian Aloi told Graifer that everything would be straightened out and that Hellerman would be permitted to complete the deal. Dioguardi later informed Hellerman that petitioner had specified some changes in the terms of the deal. Out of the $45,000 Hellerman was to receive, Fusco and Savino were to receive $10,000, Ralph Lombardo (another conspirator) was to receive $10,000 owed him by Hellerman, and Dioguardi was to receive the remaining $25,000 (Pet. App. 7a-8a).

Hellerman succeeded in obtaining $127,500 for shares of AYSL stock. In August 1970 Graifer delivered $45,000 from the proceeds to Lombardo, who in turn gave it to Dioguardi. Dioguardi gave $20,000 to petitioner, who distributed $10,000 to Fusco and Savino and $10,000 to Lombardo (*id.* at 9a).

In sum, the evidence showed that "what had started as an effort to raise money for AYSL had been taken over by Hellerman, Lombardo, [petitioner] and Dioguardi as a scheme to obtain money from the public

via the sale of AYSL stock for their own use and purpose without disclosure of this fact to the purchasers" (Pet. App. 9a).

ARGUMENT

1. Count 18 charged petitioner with willfully and knowingly using and causing to be used a false and misleading offering circular. Although petitioner did not take part in the sales efforts, the district court submitted this count to the jury, charging it that each conspirator is liable for substantive crimes committed by others in furtherance of the conspiracy. *Pinkerton* v. *United States*, 328 U.S. 640. The court charged (Tr. 5495):

> I further advise you, if you find the issuance of the circular was in furtherance of the conspiracy and in the reasonable contemplation of the contemplation [*sic*] of the conspirators, you may find any defendant whom you may have found guilty of conspiracy, to be also guilty of the crime of issuing the false financial statement alleged in count 18 of the indictment.

a. Petitioner contends that this instruction was insufficient because it failed to charge the jury that it was required to find that some party *willfully* used a misleading circular. However, petitioner did not object to the instruction given and, under Fed. R. Crim. P. 30, cannot object now.[1] If the charge was

[1] The district court offered all counsel an opportunity to object to the charge given and supplemented his charge pur-

error at all, it was not such plain error that the lack of objection can be overlooked. The charge as a whole adequately apprised the jury that in order to find petitioner guilty the specified acts had to have been done willfully rather than by negligence, inadvertence or mistake. The court advised the jury that to find any defendant guilty of Count 18 it would have to find (1) that the defendant was guilty of conspiracy and (2) that the issuance of a misleading circular was within the contemplation of the conspirators (Tr. 5495). While the district court did not specifically recite the statute and its precise terms, it furnished the jury copies of the indictment for use during their deliberations. The indictment clearly states that the charge involves willfulness. Finally, later in the charge the court instructed the jury on other substantive counts in light of *Pinkerton* and informed it that all such acts must have been deliberate and within the contemplation of the conspirators to justify derivative liability (Tr. 5497, 5499, 5516).

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suant to a request from defense counsel (Tr. 5502-5518). However, counsel did not object to the charge on the grounds presently set forth and thereby failed to preserve the issue. *United States* v. *Williams*, 455 F.2d 361, 365 (C.A. 9), certiorari denied, 409 U.S. 857; *United States* v. *Leach*, 427 F.2d 1107, 1113 (C.A. 1), certiorari denied, 400 U.S. 829. Petitioner's observation that the government had requested a willfulness instruction and that the court had not advised counsel that such an instruction would not be given (Pet. 17-20) is immaterial; petitioner had ample (and unused) opportunity to object to the charge at the proper time—after it was given.

b. Petitioner also objects to the charge on Count 18 on the ground that the court referred to the "issuance" (Tr. 5495) of the misleading circular rather than (as the indictment charged) the "use" of it (Pet. 14-17). Again, no objection was made at trial, and the error, if any, is hardly "plain."

The court of appeals held that the offering circular was "used" because it was filed with the SEC and remained filed, unamended, lending an "aura of legitimacy to the scheme" (Pet. App. 28a). As the court held, the circular should have been amended to reflect the conspirators' plan for distribution of the proceeds to repay private debts. When viewed in this context the court's charge was sufficient. The court instructed the jury (Tr. 5495):

> Count 18 charges in effect that this printed prospectus or brochure about which you heard so much, namely Exhibit [?] was false and misleading in that it failed to disclose several material facts including among others, that Hellerman was involved in the deal and that some $45,000 would be siphoned off to the five defendants originally on trial before you.
>
> I needn't trouble you with reciting the other omissions which you have already heard about.
>
> I advise you as a matter of law, if you find that this circular did fail to make the disclosures mentioned in the indictment and that if such disclosures would in your judgment have been of material interest to a purchaser of the securities, the issuance of that prospectus would have violated the securities laws of the United States.

This charge specifically drew the jury's attention to the critical failing of the circular arising out of circumstances after its filing. The court also instructed the jury that it could hold conspirators responsible only for substantive crimes occurring after they became members of the conspiracy (Tr. 5502). The instructions actually given, and the jury's possession of the indictment, answer the contention that the district court's use of the word "issuance" could be read as meaning "filed"—an act prior to the conspiracy. It is apparent that the district court was using the term "issuance" synonymously with "use" and that the jury so understood.

2. Petitioner finally contends (Pet. 21-29) that the sentences imposed denied him due process of law because their severity was caused by allegations of "other crimes" concerning which he was not offered an opportunity to confront and cross-examine his accusers. However, sentences imposed by district courts ordinarily are not reviewable. *Dorszynski* v. *United States*, 418 U.S. 424. It is also well established that the district court has wide discretion to determine what information to consider and what weight to give to that information. *United States* v. *Tucker*, 404 U.S. 443, 446-447. A sentence within the statutory limits is subject to attack only when based upon improper or inaccurate information, or when the district court has abdicated the exercise of its discretion. See *United States* v. *Foss*, 501 F.2d 522 (C.A. 1). A sentencing judge is entitled to "con-

duct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States* v. *Tucker*, *supra*, 404 U.S. at 446. And in determining the appropriate sentence for a particular defendant, the sentencing judge may consider evidence of crimes for which that defendant has not been convicted. *Williams* v. *New York*, 337 U.S. 241, 244. Petitioner offers no persuasive reason to reexamine these rules, which, *Dorszynski* held, should be followed unless and until altered by Congress.

Moreover, the record clearly demonstrates that petitioner was not sentenced for other crimes not resulting in conviction or on the basis of unsupported allegations. Although the court alluded to many allegations listed in the presentence report (Hr. 22-23),[2] petitioner's perjury conviction in state court, and the likelihood that the conviction indicated some involvement by petitioner in an unsolved murder (Hr. 23), the merits of these allegations were debated at length in a hearing. Petitioner had ample opportunity to correct factual misimpressions. And the court specifically disclaimed any reliance on these allegations (Hr. 23-25).[3] The court relied instead upon the

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[2] "Hr." refers to the transcript of the sentencing proceeding held on February 5, 1974.

[3] The conflict among the circuits to which petitioner alludes (Pet. 26-27) concerns the weight that can be given to particular allegations of misconduct. Here, however, the court altogether disclaimed reliance upon petitioner's prior misconduct.

consequence of the scheme for which petitioner was convicted: the public's loss of enormous sums of money (Hr. 25).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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